

# 2012 Annual Case Law Update

## Missouri Municipal and Associate Circuit Judges Association

Prepared for the 2012 Regional Continuing  
Judicial Educational Seminars

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# 2012 Annual Case Law Update

## MMACJA Regional Educational Seminar

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## **ELEMENTS OF THE OFFENSE – Credible threat may be communicated through intermediary**

***State v. Bernhardt*, 338 S.W. 3d 830 (Mo. App. E.D. 2011)**

Dr. Paul Packman treated his cousin Roger Bernhardt from late 2001 to early 2002. The defendant (Bernhardt's son), claimed he was dissatisfied with the treatment Dr. Packman had provided to his father and wanted to sue Dr. Packman for medical malpractice, take his license and house and "just finish him off." Bernhardt relayed his son's general feelings to Dr. Packman. However, he left out the specific language.

One night in 2009 the defendant went to Packman's residence with a loaded gun and parked in the street in front of the house. Packman's son saw the defendant parallel park in the street, pull away and return two or three minutes later, again parallel parking in the street. Packman's son called the neighborhood security officers. Five minutes passed and the defendant drove away before security arrived. Ten minutes later the defendant appeared again, where he stopped the car turned on the interior light and loaded a handgun. Packman's son called security a second time and when they arrived they attempted to pull defendant over but the defendant sped away.

About 90 minutes later the defendant appeared again. This time he parked the car in the middle of the street and got in and out of the car three to four times carrying the handgun. Packman's son called the police this time and they apprehended the defendant a few blocks away, seizing a handgun in the trunk of the vehicle. The defendant was arrested for trespassing, although he claimed to the police during questioning that he had thought about going up to the house but decided against it. Dr. Packman was informed of the night's events when he awakened the next morning.

At trial the defendant moved for judgment of acquittal claiming there was no evidence that he had communicated a credible threat as required by statute. The court denied the motion. The defendant was convicted of aggravated stalking and armed criminal action. Defendant claimed that the record was void of any evidence that he had communicated a credible threat, and that the term "communicate" was unconstitutionally vague.

The court first addressed the issue of the constitutionality of the term "communicate." Given the plain meaning of the term and its sufficiently common understanding, the court found nothing vague about the term, denying the claim that the statute was unconstitutionally vague. Next the court looked to whether there was enough evidence to communicate a credible threat. The court held that a credible threat can be communicated through many means; including another person, an electronic device, or the postal service. The court stated it is sufficient that the threat reach the victim through the intermediary to qualify as having been "communicated."

Next the court looked at the defendant's argument that the threat was not a credible one. The court stated that by parking in an illuminated street in front of the house numerous times, and stepping in and out carrying a handgun, is sufficient to show a credible threat. Because the threat was credible and it was communicated to the victim, even if through an intermediary, the trial court did not error in denying defendant's motion for acquittal.

## **CRIMINAL PROCEDURE – Knowing and voluntary guilty plea waives all future non-jurisdictional defenses**

### ***Flint v. State*, 341 S.W. 3d 688 (Mo. App. S.D. 2011)**

After serving a 40 year prison sentence in Arkansas, Flint left the state headed for Missouri. Upon arrival he robbed a payday loan office, shooting a patron in the process. Flint was apprehended and gave police a video-taped confession. Flint entered a plea bargain in which the court specifically asked him if he was aware of each and every charge, laying out each element of every charge and ensuring Flint was aware of what he was admitting to. Flint answered in the affirmative to each and every element and offense. Soon after, he appealed claiming there was no adequate factual basis supporting his guilty plea.

To find a factual basis to accept a guilty plea the court must find the plea was entered into intelligently and voluntarily. A plea is knowing and voluntary if the defendant is informed of the elements of the offense at or before the plea hearing and understands them. If a guilty plea is knowing and voluntary it waives all non-jurisdictional defects and defenses. At the plea hearing Flint expressly and unequivocally admitted that he committed the offenses charged, the essential elements of each charge, and that he was pleading guilty because he actually was guilty. Because he knowingly and voluntarily admitted to each element of the offense the Court of Appeals affirmed his conviction.

## **SEARCH AND SEIZURE - Violation of Fourth Amendment not resolved by outstanding warrant**

### ***State v. Grayson*, 336 S.W.3d 138 (Mo. banc 2011)**

Matthew Grayson appeals asserting the trial court erred in refusing to suppress evidence located following an allegedly illegal stop of Grayson's vehicle. Grayson was stopped by Officer Lambert after an anonymous tip relayed to the officer by the dispatcher. The description of the make and model of the vehicle given to the officer and the actual description of the vehicle of Grayson did not match, and there was no traffic violation by Grayson that warranted the stop. When the officer reached the defendants window he immediately found it was not Mr. Reed, the man named in the anonymous tip. However, the officer realized the man in the vehicle to be someone with whom he was previously acquainted, and who had a history of outstanding warrants. Knowing the man's identity and his history, the officer decided to take his license and run it to see if he currently had any warrants out for his arrest. Grayson did in fact have a warrant out, and the officer arrested him. After the arrest the officer found a methamphetamine pipe in Grayson's pocket. After arriving at the jail, Officer Lambert found a bag containing .05 grams of methamphetamine that Grayson had stashed under the seat in the officer's car.

Before trial in Phelps County Grayson filed a motion to suppress the evidence claiming it was found during an illegal search. The trial court refused to suppress the evidence and allowed it at trial. Grayson was then convicted of possession of a controlled substance and received a seven year sentence.

On appeal to the Southern District, the appellate court reviewed the defendant's two allegations as to why the trial court erred. First, Grayson alleges that the trial court erred by denying his motion to suppress because the stop was not based on reasonable suspicion, in that the anonymous tip that provided the basis for the dispatch was uncorroborated and Defendant did not commit any traffic violations. Second, Grayson argues that the trial court erred in denying the motion to suppress because evidence located on his person and in the patrol car was found while he was detained beyond the investigatory purpose for the traffic stop without any reasonable suspicion.

The Court of Appeals agreed that the initial traffic stop was invalid. "An anonymous tip by itself seldom, if ever, provides reasonable suspicion that a person has committed a crime warranting a Terry-stop." *State v. Weddle*, 18 S.W.3d 389, 393 (Mo. App. E.D. 2000). However, if an anonymous tip is corroborated by independent police work, it may carry "sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." *Florida v. J.L.*, 529 U.S. 266, 270 (2000). After realizing that Grayson was not Mr. Reed, the officer should have allowed Grayson to proceed without any further questioning unless he observed other specific, articulable facts that would have supported an objectively reasonable suspicion that Grayson was involved in criminal activity. See *Weddle*, 18 S.W.3d at 394. There was nothing to show that Officer Lambert had formed this type of reasonable suspicion.

As a general rule, evidence discovered and later found to be the result of a Fourth Amendment violation must be suppressed as the "fruit of the poisonous tree." *State v. King*, 157 S.W.3d 656, 664 (Mo. App. W.D. 2004). This general rule, however, is not absolute. *Id.* The Supreme Court has emphasized that "whether the exclusionary sanction is appropriately imposed in a particular case . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" *Hudson v. Michigan*, 547 U.S. 586, 591-92 (2006). If the interest violated has nothing to do with the seized evidence, the exclusionary rule is inapplicable. *Id.* at 594.

The Court of Appeals ruled that because the defendant had an outstanding arrest warrant (meaning he could be seized and arrested at any time by any law enforcement officer), the illegal traffic stop was attenuated by the arrest warrant, and any evidence found after the arrest was not subject to the exclusionary rule. Therefore, the Southern District found the trial court had not erred in refusing to suppress the evidence. The Supreme accepted the case on an Application for Transfer filed in that court.

The Supreme Court reviewed the decisions of the lower courts and stated that Grayson had been illegally detained and the evidence of the methamphetamine was the fruit of this illegal detention. The State argued that the discovery of the warrant should attenuate the illegal detainment making the discovery of the methamphetamine evidence lawful. The Court stated that Grayson's detainment should have ended the moment the officer realized Grayson was not the man he was after and therefore the discovery of the warrant did not attenuate the taint of the

illegal detainment. The Court held the motion to suppress the evidence should have been sustained. The judgment was reversed and the case remanded.

## **SEARCH AND SEIZURE – Warrantless search permitted where exigent circumstances exist**

### ***Kentucky v. King*, 563 U.S. \_\_\_\_ (2011) No. 09-1272, May 16, 2011**

After an officer witnessed a controlled purchase of crack cocaine outside an apartment complex the officer radioed in the pursuit of the suspect drug dealer. The suspect entered the breezeway of the apartment complex before the officers were able to observe which of the two apartments located in the breezeway the suspect had entered. Smelling the scent of burned marijuana the officers knocked on the door to the left to inquire whether the suspect was inside. After loudly knocking on the door and receiving no reply the officers heard a rustling noise coming from within the apartment which sounded to them as a possible destruction of drug-related evidence. Believing this evidence was being destroyed the officers announced they were going to make an entry into the apartment. Upon entering the apartment and through a subsequent search the officers found marijuana, powder cocaine, crack cocaine, drug paraphernalia and cash.

Defendant filed a motion to suppress the evidence due to warrantless search, but it was denied by the Circuit Court. The defendant then entered a conditional guilty plea reserving his right to appeal the motion to suppress the evidence. The Court sentenced the defendant to 11 years imprisonment for trafficking in marijuana, first-degree trafficking in controlled substance and second-degree persistent felony offender status. The defendant appealed and the Court of Appeals affirmed the holding stating the exigent circumstances justified the warrantless search because the police reasonably believed that evidence would be destroyed, and the police did not unreasonably create the exigency.

The Supreme Court of Kentucky reversed, announcing a two part test to determine if the police unreasonably created the exigency. First, the court held police cannot deliberately create the exigency circumstances to avoid the warrant requirement. Second, even absent bad faith, police could not rely on exigent circumstances if it was reasonably foreseeable that the investigative tactics employed by police would create the exigent circumstances. The court found no bad faith but found that the police could reasonably foresee that the occupants would destroy the evidence when they knocked on the door and announced their presence.

The U.S. Supreme Court on certiorari reviewed the multiple tests employed by different states to determine when a warrantless search is justified by the exigent circumstances rule. It is well established that the basic principle of the Fourth Amendment is that searches and seizures inside a home without a warrant are presumptively unreasonable. *Brigham City v. Stuart*, 547 U.S. 398 (2006). However, this presumption may be “overcome in some circumstances because the ultimate touchstone of the Fourth Amendment is ‘reasonableness.’” *Brigham City, supra*, at 403. The exception which applies here applies when the “exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under

the Fourth Amendment. Some examples of when exigencies are created are in situations of emergency aid, in hot pursuit of a fleeing suspect, and to prevent the destruction of evidence. This last example has created what is known as the “police created exigency doctrine.”

The doctrine provides that police may not rely on the need to protect evidence from destruction when the exigency was created by the conduct of the police. The Court stated that the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense. The defendant argues that the police impermissibly created an exigency when they engaged in conduct that would cause a reasonable person to believe that entry is imminent and inevitable. The defendant relies on factors such as the officer’s tone of voice when announcing their presence and the forcefulness of the knock on the door.

The Supreme Court refused to accept this argument stating that the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment. The officer’s conduct in knocking on the door was entirely consistent with the Fourth Amendment and the officers did not announce their intent to enter the apartment until after the exigency (the need to protect destruction of evidence) arose, and therefore the announcement could not have created the exigency. The court noted that to say the tone of an officers voice or the forcefulness of an officers knock are enough to create an exigency would place an extreme difficulty on officers to know how loudly they may announce their presence or how forcefully they may knock on a door without running afoul of the police-created exigency rule.

The Court held that because the officers in this case did not violate or threaten to violate the Fourth Amendment prior to the exigency that the exigency justified the warrantless search of the apartment.

## **SEARCH AND SEIZURE – Suspicious behavior justifies extending scope of search**

### ***State v. Waldrup*, 331 S.W. 3d 668 (Mo. banc 2011)**

Two men driving down an interstate approached a license checkpoint. Upon noticing the troopers the passenger in the vehicle started acting very suspiciously, eyes open wide, mouth dropped and reached down to the floor board as if attempting to conceal either a weapon or some sort of contraband. The troopers took notice of this and began to investigate the situation.

The troopers each approached the vehicle from different sides, initially asking for the identification of the driver. The driver presented a Kansas License which was suspended so the trooper issued a citation. Simultaneously the trooper on the passenger side asked the passenger, Mr. Waldrup to exit the vehicle while he did a plain view scan of the interior of the vehicle. The trooper did not see anything in plain sight and proceeded to perform a *Terry* frisk of Waldrup. He did not find anything on Waldrup’s person; however the trooper was not relieved of his initial

suspicion that Waldrup may have a weapon in the vehicle. Rather than do an in-depth search of the vehicle, the trooper asked Waldrup for his identification. Waldrup did not have any identification on him but provided his name, date of birth and social security number. Upon radioing in the information the trooper found Waldrup had many outstanding warrants. Waldrup was immediately placed under arrest and given a full body search. The search revealed about \$365 dollars tucked into Waldrup's sock and a white rock (which was later found to be cocaine) in between the sole and cushion of his shoe.

Waldrup was charged with possession of a controlled substance. Prior to trial, Waldrup's counsel filed a motion to suppress the evidence claiming the evidence was found after the time the traffic stop legally should have concluded, and therefore the continued detention and discovery of the drugs were not justified. The motion was overruled and the all objections made as to this evidence were overruled during trial. Waldrup was found guilty and sentenced to 12 years imprisonment.

On appeal Waldrup argued that the trial court erred in overruling his motion to suppress and objections at trial because the evidence was obtained in violation of the Fourth Amendment. In reviewing the case the Supreme Court noted that officers are permitted to make brief, investigatory stops if they are able to point to "specific articulable facts" that, taken together with rational inferences from those facts, supports a "reasonable suspicion" that illegal activity has occurred or is occurring. Even if such a reasonable suspicion exists, the stop still must "be strictly circumscribed by the exigencies which justify its initiation." The analysis is two fold: 1) whether the officers' actions were reasonably related in scope to the circumstance which justified the initial stop and 2) whether the officer's actions were reasonably related in scope to the circumstances which justified the interference in the first place.

Both officers testified to specific articulable facts; i.e., having seen Waldrup's eyes opened wide and his mouth kind of hanging open as if concerned with the troopers presence, and having witnessed Waldrup reach very deep into the floorboard as if to conceal a weapon or contraband. This was sufficient to show it was reasonable for the troopers to assume criminal activity was taking place.

Having established the validity of the stop the propriety of the ensuing search must be addressed. Under the *Terry* principle, officers may detain travelers involved in a routine traffic stop for matters unrelated to the traffic violation if they have reasonable and articulable grounds for suspicion of illegal activity. A *Terry* stop is more than just a frisk for weapons. It is an investigation hinged upon an officer's reasonable suspicion and consequently, a *Terry* stop detainee may be asked a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicion. In this case, the troopers were not limited to only the investigation of the driver because the initial suspicion came from the suspicious behavior of the passenger, which prompted the investigation. Further, the officers used the least intrusive means available by radioing in his information rather than searching the entire vehicle to determine whether Waldrup was a threat. At no point up to the arrest was the suspicion dispensed with and therefore the detention was not unjustified, and was within the confines of the Fourth Amendment.

The Supreme Court held the trial court did not error in overruling the motion to suppress because the evidence was found as a result of a lawful detention and arrest. The judgment was affirmed.

**CRIMINAL PROCEDURE – Counsel’s failure to advise of certain parole requirements does not invalidate guilty plea**

***Smith v. State*, 353 S.W.3d 1 (Mo. App. E.D. 2011)**

Antoine Smith appeals the denial of his Rule 24.035 motion for post conviction relief without an evidentiary hearing, asserting that his plea counsel had been ineffective for failing to advise him that he would have to serve eighty-five percent of his sentence before becoming eligible for parole. Smith had pled guilty to forcible sodomy, attempted forcible rape, first-degree assault, and first-degree robbery, all of which are classified as dangerous felonies under Section 556.061(8) and 558.019.3.

Smith asserted his plea counsel did not inform him that he would have to serve eighty-five percent of these sentences before being eligible for parole and thus, his guilty plea was involuntary, unknowing and unintelligent. He stated he would have proceeded to trial had his counsel informed him of the eighty-five percent requirement. The Eastern District disagreed with the defendant and stated that plea counsel was not required to inform the defendant about the amount of time served before being eligible for parole in order for his plea to be voluntary.

The appellate court reasoned that the Missouri Supreme Court has held that eligibility for parole is considered to be a collateral consequence of a plea and thus, information about eligibility for parole is not among those direct consequences about which a defendant must be informed in order for the plea to be entered voluntarily and intelligently. The court did discuss, however, *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010) and whether its discussion of the direct/collateral distinction should be applied to this claim that plea counsel was ineffective. Although the *Padilla* court was discussing deportation as a direct/collateral consequence, the Court in *Padilla* found that when immigration consequences of a guilty plea are clear, the duty to give correct advice is equally clear. The Court declined to limit its holding to the factual circumstance of affirmative misadvice, reasoning that such a limitation would give counsel an incentive to remain silent on important matters and deny vulnerable clients rudimentary advice when it is readily available.

The Eastern District noted that the Missouri Supreme Court had discussed *Padilla* on the distinction between direct and collateral consequences of pleading guilty in *Webb v. State*, 334 S.W. 3d 126 (Mo. banc 2011). In *Webb* the defendant had alleged he did not receive effective representation because his attorney misled him by telling him he would not be required to serve eight-five percent of his sentence before becoming eligible for parole. This information was incorrect but the Missouri Supreme Court noted that it did not need to discuss whether the defendant was entitled to relief under *Padilla* because case law recognized the distinction between misinformation and a failure to inform. Misinformation renders the representation ineffective and thus the defendant in *Webb* was granted relief.

The Eastern District stated that the Court in *Webb* left unanswered the question of the expansion of *Padilla* beyond the deportation context. Thus, since the case at hand involved a mere failure to inform rather than the affirmative misinformation that was at issue in *Padilla* and *Webb* then this Court would be bound by existing case law. Existing case law dictates that parole is a collateral matter, which does not affect the voluntariness of the plea. As a result, the Court affirmed the motion court in denying the defendant's motion for an evidentiary hearing.

**EVIDENCE – Showing victim a single mug shot is not unduly suggestive where there is no improper police comment**

***Foster v. State*, 348 S.W.3d 158 (Mo. App. E.D. 2011)**

In this case Chavez Foster appeals from a jury verdict convicting him of first degree assault, armed criminal action and attempted first degree robbery. The defendant raises two points on appeal. First, that the trial court erred in denying his motion to suppress in-court and out-of-court identifications of the defendant and secondly, the defendant contends that the trial court should have granted a mistrial when the prosecutor referred to the defendant as a "sociopath" in closing argument. The Eastern District disagreed with the defendant and denied both points on appeal.

The facts: The victim of this offense was walking home from work when he was approached by the defendant and shot in the arm near his home in an apartment complex. The defendant ran away and the police arrived at the victim's home shortly after he was shot. He gave a description to the police of the man who shot him and the officer immediately thought of the defendant as he had been placed on a no trespass list for the apartment complex. About an hour after the shooting the officer went to see the victim at the hospital and showed him a mug shot of the defendant. The victim identified the defendant from the mug shot. The next day the victim was shown a photo lineup by an officer. The lineup consisted of six photos, including the same mug shot shown to the victim in the hospital. The victim again identified the photo of the defendant. At trial, the victim identified the defendant in court. At trial, during closing argument, the prosecutor referred to the defendant as an "extremely violent individual who's a sociopath." The defendant was convicted.

As to the identification issue, the defendant argued that the in court and out of court identifications were the result of unnecessarily suggestive police procedures which create a substantial risk of misidentification and were unreliable under the totality of the circumstances. The Eastern District noted that Missouri cases have long recognized that the showing of a single photograph to a witness where there is no improper comment or activity on the part of the officer showing the photograph does not result in impermissible suggestiveness. Furthermore, the court noted that an initial identification by photo followed by a line up identification is not per se unduly suggestive. The repeat use of a photo in a lineup will not be suggestive if the record shows the identification was based solely on the witness's memory. Accordingly, the Eastern District did not find any error in the trial court's admission of the identifications.

As to the defendant's second point on appeal, the Court noted that the defense counsel's objection to the officer's testimony and the prosecutor's closing argument was sustained and the jury was instructed to disregard the testimony. The Eastern District noted that the trial court is in a better position to assess the prejudicial effect of testimony on the jury and to evaluate the means to cure any resulting prejudice. Thus, the court denied defendant's second point on appeal.

The trial court was affirmed on both points.

#### **DEPARTMENT OF REVENUE REVOCATION CASES – No specific time requirement for Director to commence suspension action**

##### ***Lawrence v. Dir. of Revenue, 354 S.W.3d 213 (Mo. App. E.D. 2011)***

The defendant appeals from the circuit court's judgment sustaining the suspension of the defendant's driver's privileges. Lawrence asserts that the circuit court erred in sustaining the suspension of the his privileges and declaring no statute of limitation applies to the Director of Revenue in imposing an administrative alcohol suspension. The Eastern District affirmed the circuit court.

The facts of this case were such that on October 23, 2007, a University City police officer arrested the defendant for DWI. The defendant failed field sobriety tests and failed a blood alcohol content test. The officer did not, however, seize the defendant's drivers license or personally serve notice of a suspension or revocation on the driver. The officer also did not send an administrative packet to the Department of Revenue to begin the suspension of the defendant's driving privileges. The officer simply collected the information and sent it to the police department clerk division which handles administrative paperwork. Approximately eighteen to twenty months later, the Director of Revenue notified the defendant of an administrative suspension of his driving privileges. The defendant timely requested an administrative hearing to contest the suspension. A DOR hearing officer sustained the suspension of the defendant's driving privileges.

The defendant filed an application for a trial *de novo* in the circuit court. The defendant argued the DOR's action in suspending his driving privileges were untimely and barred by the statute of limitation and laches. The circuit court found that no statute of limitations exists governing the time frame for DOR to impose an administrative suspension/ revocation and sustained the suspension of the defendant's driving privileges.

In affirming the circuit court findings, the Eastern District stated that Section 302.520 provides two ways in which drivers may be notified of a pending suspension. The officer may take possession of the arrested driver's license and personally serve notice of the suspension or revocation on the arrested driver or the driver can subsequently receive notice by mail as allowed in Section 302.515. The two statutes, 302.520 and 302.515 provide two distinct ways of providing adequate notice of a suspension or revocation of driving privileges, either by the arresting officer or the Director. Neither of the statutes sets out a time by which such notification must occur. The Court declined to impose a timeliness requirement where none exists in the statutes. The defendant argued that the statutory intent was to quickly remove drunk drivers

from the roadways. The Court stated that they agreed that that was the best practice, however, there was no timeliness requirement under the statutes and thus refused to make such a finding.

The defendant's second argument of laches was also rejected. The court stated that for laches to apply the delay must be unreasonable and unexplained and the other party must be materially prejudiced. In this case the Eastern District stated that there was no showing of affirmative misconduct on the part of the director and the defendant's assertion of prejudice was not sufficient to invoke laches against the DOR where there was no showing that the DOR's conduct amounted to affirmative misconduct. Thus, the circuit court was affirmed.

### **CRIMINAL PROCEDURE – No prejudice in amending charging papers to establish enhanced sentencing**

#### ***Smith v. State*, 353 S.W.3d 93 (Mo. App. E.D. 2011)**

Eugene Smith appeals the denial of an evidentiary hearing on his post conviction relief motion. The defendant claims the plea court erred in his sentencing because the state failed to plead the prior convictions upon which the plea court based its findings until two days after the plea hearing and sentencing. The Eastern District affirmed the motion court and denied the defendant's motion for relief.

The defendant in this case appeared and pled guilty with counsel to the class C felony of possession of heroin. At the plea hearing, the defendant acknowledged that he had a "whole slew of priors", but denied a January 1979 felony possession charge. The defendant's counsel clarified and conceded that the defendant had significant priors but suggested that they skip the 1979 conviction and go over to more recent offenses. The prosecutor expressed concern that the more recent offenses were not included in the information. The defendant volunteered that he had been convicted of the unlawful use of a weapon in 1979 and after a brief conference off the record, the prosecutor cited a 1998 possession charge and the 1979 unlawful use of a weapon charge. The defendant admitted both priors under oath. The prosecutor requested to file an amended information to include the convictions to which the defendant admitted and defense counsel made no objection. The court granted the request and found the defendant to be a prior and persistent offender and a prior drug offender which increased his sentencing range. He was sentenced to twelve years imprisonment with a recommendation that he be placed in a 120 day treatment program. Two days later, the prosecutor filed an amended information that included the two prior felony convictions the defendant admitted at the hearing.

The defendant then filed a post conviction relief motion after being denied probation at the end of the 120 days. The motion court denied his motion without an evidentiary hearing. The defendant asserts that the plea court erred in his sentencing because the state failed to initially plead the prior convictions upon which the plea court based its finding of prior and persistent offender. The Eastern District in affirming the motion court stated that it was undisputed that the defendant was aware of the state's intention to seek enhanced punishment and was not surprised or misled by the court's sentence. The defendant with counsel appeared

and cooperated with the prosecution after it became clear the original convictions listed in the information would not suffice. The defendant volunteered the unlawful use of a weapon conviction and acknowledged the charged drug possession conviction. The prosecutor made clear his request to file an amended information and the defense did not object. The prosecutor's request was granted by the court and the prosecution followed through by filing the amended information. At no time before, during, or after the hearing did the defendant or his attorney object or give any indication that they were surprised or misled.

The Eastern District followed existing case law that establishes the defendant's admission of his prior convictions under oath sufficiently establishes all the facts necessary for the plea court to find the defendant to be a persistent felony offender. *State v. Gibbs*, 306 S.W.3d 178,183 (Mo. App. E.D. 2010) Furthermore, the defendant could not claim he was prejudiced in the preparation of his defense by the variances between the original information and the oral additions because, unlike claims by previous defendants who had actually gone to trial, the defendant in this case showed no intention of presenting a defense. See *State v. Martin*, 882 S.W.2d 768 (Mo. App. E.D. 1994) The defendant and his attorney made every effort to cooperate with the state and the state's efforts to charge the defendant as a persistent felony offender. Thus, the motion court's denial of the defendant motion for post conviction relief is affirmed.

#### **CRIMINAL PROCEDURE – Motion court required to conduct evidentiary hearing on ineffective assistance of counsel**

##### ***Conger v. State*, 356 S.W.3d 217 (Mo. App. E.D. 2011)**

Conger appeals the judgment of the circuit court denying his post conviction relief motion without an evidentiary hearing. Conger asserts that the motion court erred in denying him an evidentiary hearing to consider his claim that he received ineffective assistance of counsel because (1) plea counsel's desire to obtain payment for her legal services at trial conflicted with the defendant's interest in going to trial; and (2) plea counsel failed to investigate a defense based on involuntary intoxication. The Eastern District reversed and remanded, instructing that an evidentiary hearing as to point one was required.

In this case the defendant was charged with and pled guilty to first-degree robbery, armed criminal action, resisting arrest, second degree burglary and stealing. At the plea hearing, the court explained to the defendant his right to a jury trial and the defendant affirmed that he understood those rights and the consequences of his decision to plead guilty. After the prosecutor reviewed for the defendant the nature and elements of the charges and the possible ranges of punishment, the defendant assured the court that no one had threatened, coerced or promised him anything in exchange for his guilty plea. The plea court accepted the defendant's plea and found him guilty of the charges beyond a reasonable doubt.

The sentencing court then advised the defendant of his post-conviction rights and questioned him about the assistance of counsel he had received. When asked whether he was

completely satisfied with plea counsel's services, the defendant answered "in some ways, yes; other, there was more evidence I would like that would have been out there...Just-just a witness, hours of work, right now I can't think much." The plea court inquired further in an effort to understand the defendant's statements. The defendant stated that his attorneys explained the charges to him, investigated his case fully, discussed with him any possible defenses he might have to the charges, interviewed and investigated any witnesses who might have helped with his defense, and did everything the defendant asked them to do. The defendant said he had no complaint and the court concluded that there was no probable cause that the defendant had not been effectively represented by counsel.

The defendant then filed a motion for post conviction relief stating that counsel was ineffective for "coercing him into pleading guilty because he could not pay plea counsel's legal fees for trial." The defendant alleges that plea counsel's financial interest in obtaining payment for her legal services conflicted with his interest in continuing to plead not guilty. To prevail on such a claim of ineffective assistance of counsel based on conflict of interest, the defendant must show that an actual conflict of interest adversely affected counsel's performance. If the defendant proves that counsel had an actual conflict of interest affecting his performance, then prejudice is presumed. The Court stated that a defendant's inability to pay legal fees does not automatically give rise to a conflict of interest. However, a counsel's statement to a defendant that he or she must pay additional fees to continue receiving counsel's services is not in itself coercive. A financial conflict of interest may arise when a defendant's inability to pay creates a "divergence of interests" between the defendant and counsel, such that counsel pressures or coerces the defendant to plead guilty where, absent the coercion, the defendant would have taken the case to trial.

The facts in this case (as alleged by the defendant) establish that plea counsel filed motions to withdraw twice before the defendant pled guilty. Nonetheless, the plea court denied the motions. The defendant's family had paid plea counsel a total of \$11,500 for the defendant's cases and believed that such payment included all the litigation costs. The defendant was told, however, that it would cost an additional \$20,000 to take the cases to trial. Defendant alleges that counsel pressured him to plead guilty by telling him she would not take his cases to trial until additional legal fees were paid.

The Eastern District stated that negative responses to a routine inquiry regarding whether any promises or threats had been made to induce a guilty plea is too general to negate or refute the defendant's allegations. Moreover, there was no indication in the record that the plea court or counsel informed the defendant that if he could not afford an attorney for trial, the court would appoint trial counsel for him. Thus, the court remanded defendant's case to the circuit for an evidentiary hearing as to point one.

As to point two, the court stated that it was negated by the plea colloquy and affirmed the circuit court.

**CRIMINAL PROCEDURE – Motion for continuance to be written and to specify reasons for request**

***State v. Hayes*, 347 S.W.3d 676 (Mo. App. E.D. 2011)**

In this case Arlee Hayes was charged with second-degree murder as a result of the perpetration of the class A felony of abuse of a child. The evidence at trial was that Hayes had been left to care for the victim while the mother of the child was at work. After the child died Hayes placed the child in its car seat and picked the mother up from work. He then carried the child in and placed her in her crib. The mother did not discover that the child was dead until the next morning. Appellant told the mother that the child had died accidentally in the bath tub when he was giving her a bath. He said he tried CPR but was unsuccessful. However, the medical examiner observed numerous injuries to the child's head which were inconsistent with a single fall in the bathtub. She had multiple contusions centered about the crown of her head and additional injuries to the corners of her lips. One of the victim's injuries appeared to have a pattern similar to the pattern of a ring worn by Appellant every day.

The trial court found Appellant guilty of second degree murder and abuse of a child. The court found that the Appellant hit the victim on the head and placed her in the bathtub to clean her up. He then left her unattended and as a result of her injuries she either lost consciousness and drowned or was unable to save herself from drowning. The court also found that her injuries reflected strikes that were cruel and inhuman.

Appellant raised two points on appeal. First, he argued that the trial court erred in overruling his motion for judgment of acquittal at the close of all evidence because there was insufficient evidence to support the convictions. The Eastern District denied this point and stated that based on the evidence a reasonable person could have concluded that Appellant's infliction of 18 forcible blows to the head of a 22 month old child and then leaving her unattended in a compromised state in a bathtub of water was cruel and inhuman punishment ant that she died in the perpetration of such felony.

Appellant's second point on appeal was that the trial court erred in denying his verbal motion for a continuance made the morning of trial. The Eastern District affirmed the trial court and stated that the Appellant failed to make the motion in writing, as required by Rule 24.09. The rule provides that a motion for a continuance "shall set forth in writing the facts upon which the motion is based." A motion may only be made orally if the other party consents or the court finds good cause. A party's failure to comply with Rule 24.09 is sufficient reason to deny the motion. Appellant does not allege that either exception to a written motion existed. Furthermore, the basis for the motion was to conduct further investigation. The court noted that appellant's case had been pending for over a year and that defense counsel had deposed the relevant witnesses two months before trial. Counsel expressed no need for a continuance. Thus, because Appellant provided the court with nothing more than a general assertion that additional investigation should be done on information that had been available for months, the trial court did not abuse its discretion in denying the motion made on the day of trial. Appellant failed to demonstrate that any further investigation would have affected his trial. He did not identify any witness he needed to contact or depose or any experts he needed to retain. The judgment of the trial court was affirmed.

## **SEARCH AND SEIZURE – Warrantless blood draws in D.W. I. cases permitted under limited circumstances**

***State v. McNeely*, \_\_\_\_ S.W.3d \_\_\_\_ (Mo. banc 2012) SC91850**

On January 17, 2012 the Missouri Supreme Court in *State v. McNeely* (SC91850) handed down an important decision in the area of search and seizure. The issue before the Court in that case is under what circumstances in a DWI case is a nonconsensual and warrantless blood draw to determine blood-alcohol content a reasonable search and seizure under the Fourth Amendment?

### **Missouri’s Implied Consent and Refusal Law-Section 577.041 RSMO**

This case arose primarily because of a change in Section 577.041 RSMO. This section, commonly known as the “refusal” part of Missouri’s Implied Consent Law, was altered in 2010 by the Missouri Legislature. Missouri’s implied consent law, Section 577.020 RSMO states in pertinent part:

“Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent to, subject to the provisions of 577.019 to 577.041, a chemical test or tests of the person’s breath, blood, saliva or urine for the purposes of determining the alcohol or drug content of the person’s blood...”

Prior to the changes in 2010, section 577.041, the “refusal statute” read in pertinent part:

“If a person under arrest, or who has been stopped pursuant to subdivision (2) or (3) of subsection 1 of section 577.020, refuses upon the request of the officer to submit to any test allowed pursuant to section 577.020, then *none shall be given and* evidence of the refusal shall be admissible in a proceeding pursuant to section 565.024, 565.060, or 565.082, RSMO, or section 577.010 or 577.012.”

In 2010, the legislature took out the language, “*none shall be given and*”, leaving some law enforcement officers to believe that a warrantless, nonconsensual blood draw would be permitted any time an officer had reasonable suspicion that a person is driving while intoxicated. Given that the legislature is presumed to know the state of the law when amending legislation, one can only assume that the legislature knew that this change would be a significant departure from Missouri case law.

### **The U.S. Supreme Court on Warrantless Blood Draws**

*McNeely* is the first case after the legislative change to the Implied Consent Law to address the importance of the removal of those words in a DWI case. The Supreme Court in *McNeely* framed the issue as the balancing of two competing interests. One, society’s interest in preventing the harms caused by drunken driving and the other, an individual’s Fourth Amendment right to be secure in his or her person and to be free of unreasonable searches and

seizures. The landmark United States Supreme Court case addressing the issue prior to *McNeely* is *Schmerber v. California*, 384 U.S. 757 (1966).

In *Schmerber* the U.S. Supreme Court carved out a limited exception to the warrant requirement for the taking of a blood sample in alcohol-related cases. The Petitioner in *Schmerber* was convicted in a Los Angeles Municipal Court of the criminal offense of driving an automobile while intoxicated. He was arrested at a hospital while receiving treatment for injuries suffered in an accident involving the automobile he had been driving. At the direction of a police officer, a blood sample was taken by a physician at the hospital. The chemical analysis of the sample revealed that Schmerber was intoxicated. He objected to the admission of the results of the blood sample on the grounds that he had not consented to the blood draw. *Id.* at 758-759.

The Supreme Court stated that drawing an individual's blood for evidentiary purposes is a search that implicates the Fourth Amendment and ordinarily, a search warrant would be required to perform a blood draw when a person does not consent. *Id.* at 770-772. However, the Court stated that the circumstances of this case led them to carve out a very limited exception to the warrant requirement for a blood draw in alcohol-related cases. The Court reasoned that because the percentage of alcohol in a person's blood begins to diminish shortly after drinking stops, there is a threat of evidence destruction. Furthermore, there was an accident in this case requiring time to both transport the defendant to the hospital and to investigate the scene of the accident. *Id.* at 771. Thus, given these "special facts", the Court concluded that the attempt to secure evidence of blood-alcohol content was an appropriate search incident to the petitioner's arrest. Over the years, most courts have interpreted the holding in *Schmerber* as an exception to the warrant requirement due to exigent circumstances.

### **The Facts in *McNeely***

Thus, it is against this backdrop of changing legislation and Supreme Court precedent that the facts of *McNeely* arose. On October 3, 2010, Corporal Mark Winder of the Missouri State Highway Patrol observed the defendant driving above the posted speed limit. As he was following the defendant, Corporal Winder observed as the Defendant crossed the center line of the road three times. When he made contact with the defendant, the trooper detected a strong odor of intoxicants on defendant's breath and his eyes were glassy and bloodshot. The Defendant stated that he had consumed a couple of beers and the officer noted that he was unsteady on his feet. Corporal Winder administered four field sobriety tests on the Defendant, and he performed poorly on each. Defendant refused to give a breath sample into a portable breath tester and he was subsequently placed under arrest for driving while intoxicated.

Corporal Winder then began to transport the Defendant to the Cape Girardeau County Jail to administer a breath test, but the Defendant stated he would refuse to take a test. Thus, Corporal Winder transported the Defendant directly to the hospital to obtain a blood sample. He read the Defendant the Implied Consent Law and the Defendant refused. Corporal Winder then informed the Defendant that, pursuant to Missouri law, he was going to obtain the sample against his refusal. The sample was taken by a lab tech and it showed a BAC level of .154.

The State filed charges against the Defendant for driving while intoxicated and the Defendant moved to suppress the evidence. The Corporal testified at the suppression hearing, that in his 17 years of experience, he had obtained warrants for the withdrawal of blood in DWI cases, but was influenced by an article he read in “Traffic Safety News” indicating that officers no longer needed to obtain a warrant because of the recent changes in Missouri’s Implied Consent Law. The trial court suppressed the evidence and the state filed an interlocutory appeal. The Eastern District stated that it would find that the trial court erred in granting the Defendant’s motion to suppress the blood sample evidence; however, because of the general interest and importance of the issues involved, the Eastern District transferred the case to the Missouri Supreme Court, pursuant to Supreme Court Rule 83.02.

**The Missouri Supreme Court’s Analysis: Is the natural dissipation of blood-alcohol evidence alone a sufficient exigency to dispense with the warrant requirement of the Fourth Amendment?**

The State argued that in *Schmerber*, the Court gave broad authority to direct medical professionals to conduct warrantless blood draws on DWI defendants on mere probable cause of intoxication because of the dissipating nature of blood-alcohol content. The State asserted that this factor alone in DWI cases constitutes a sufficient exigency to dispense with the warrant requirement because of the dissipating nature of blood-alcohol content. This would in effect create a *per se* exigency rule in DWI cases, and no further analysis would be necessary.

The defense asserted that the Court in *Schmerber* had required *more* than the mere fact that alcohol naturally dissipated in the blood stream. Instead, it required a showing of “special facts” to provide an exigency to conduct a warrantless bodily intrusion. The “special facts” in *Schmerber* included the time delay created by the investigation of the accident as well as the transportation of the defendant to the hospital. These facts might have caused the officer to reasonably believe he was faced with an emergency situation in which the delay in obtaining a warrant would threaten the destruction (or, in this context, the natural dissipation) of evidence.

The Court ultimately sided with the defense and refused to create a *per se* exigent circumstance in DWI cases that would allow law enforcement to bypass the warrant requirement. Although the dissipating nature of alcohol was a factor to be considered, the Court stated that “special facts” would also be required. Since there were no “special facts” in *McNeely* (other than the natural dissipation of blood-alcohol), the Court held the warrantless blood draw was an unreasonable search of the Defendant’s person. The Court cited several courts who have interpreted the *Schmerber* holding consistent with the Court’s analysis. “Special facts” in each seem to involve a necessary time delay which would lead to dissipation of blood-alcohol evidence. Thus, if an accident is involved or an investigation takes an unusual amount of time, the officer might be able to dispense with the warrant requirement. The cited cases were as follows:

*State v. Rodriguez*, 156 P.3d 771, 772 (Utah 2007). In this case the defendant was crucially injured in an auto accident and rushed to the hospital. An officer went to the hospital and observed signs of intoxication. Blood was drawn from the defendant through an IV line and the results of the blood analysis were later offered as evidence. The defendant moved to

suppress the evidence. The Supreme Court of Utah stated that the dissipating nature of blood-alcohol evidence alone is not a *per se* exigency justifying a warrantless search. The court adopted a totality of the circumstances test for the determination of whether there exists a sufficient exigency to justify a warrantless blood draw. The court did not suppress the evidence, citing the seriousness of the accident and the compelling evidence of the defendant's impairment as sufficient to establish that the interests of law enforcement outweighed the defendant's privacy interests. *Id.* at 782.

*State v. Johnson*, 744 N.W.2d 340, 344 (Iowa 2008). The defendant in *Johnson* was also involved in an accident that led to serious injuries to the driver of the other car. The defendant then fled the scene on foot and the police tracked him down. He was arrested and refused a breath sample and a blood sample was taken without his consent. The defendant was charged and later moved to suppress the evidence of the blood draw. The Iowa court found that there were *Schmerber*-like time based considerations present in the case because the officer had to take time to investigate the scene, track down the fleeing defendant, administer sobriety tests, and transport him to the police station and hospital. *Id.* at 344. The Supreme Court of Iowa rejected the idea that there was a *per se* exigency based on the dissipating nature of blood-alcohol alone.

*United States v. Chapel*, 55 F.3d 1416, 1420 (9th Cir. 1995). The defendant had been charged with DWI and had been involved in a motorcycle accident. The officer was faced with an emergency situation based on the following: With the natural dissipation of blood-alcohol, the accident investigation, and the hospital transportation time delay, there was said to exist exigent circumstances justifying a warrantless blood draw. The Ninth Circuit reasoned that the warrantless blood draw could be based on probable cause instead of an arrest, but the *Schmerber* requirements were still such that an emergency must exist in which the delay to obtain a warrant would threaten the loss of evidence.

The Court dismissed the State's citation of *State v. LeRette*, 858 S.W.2d 816 (Mo. App. 1993), which the State argued could support an interpretation of *Schmerber* as consistent with a *per se* exigency rule. The *McNeely* court stated that no Missouri case supported such a rule and pointed out that in *LeRette* the defendant was the driver of an automobile involved in a serious injury accident. When the officer arrived, emergency personnel were loading the defendant into an ambulance. While investigating the accident, the officer found several beer cans among the wreckage. At the hospital, the officer found the defendant with a tube down his throat and unable to communicate. The officer directed a warrantless blood draw. The court in *LeRette*, stated that "both prongs of the exigent circumstances exception were established—probable cause that incriminating evidence would be found and exigent circumstances justifying the search." *Id.* At 817-819. The Court reasoned that simply because the *LeRette* court did not specifically list the exigent circumstances, given the facts of the case, it surely applied the "special facts" analysis of *Schmerber*.

It is interesting to note, that the State did not cite and the Court did not discuss the Missouri case of *State v. Dowdy*, 332 S.W.3d 868 (Mo. App. S.D. 2011). *Dowdy* was decided last year after the legislature changed the language in the Implied Consent and Refusal Law. The Southern District in that case approved the taking of a warrantless blood alcohol breath sample in a non-DWI case. The defendant had been arrested at the scene of a fatal shooting in which he was the prime suspect. An hour or two later he was subjected to a breath test without his consent.

There seemed to be little reason for the delay in taking the breath sample. Dowdy moved to suppress the breath test evidence.

The Southern District allowed the evidence to come in relying in part on *Schmerber*. With little discussion and citing *LeRette* as a relied upon case, the court cited the principles of *Schmerber* and others in this line of cases to support the admissibility of the evidence. There was no discussion of “special facts”; just the dissipating nature of alcohol evidence. The dissent in the case argued that the exceptions to the warrant requirement have always been limited to driving cases and should not be expanded to non-driving cases. Judge Rahmeyer specifically stated that she disagreed with the majority’s analysis in so far as it seemingly attempted to create a single factor exigency exception to the search warrant requirement any time alcohol is believed to be a factor in a crime. Since the Supreme Court in *McNeely* would not create a *per se* exigency factor in DWI cases, it seems even less likely it would agree with one in non-driving cases.

### ***Per se* Exigency Jurisdictions**

The Court in *McNeely* recognized that other jurisdictions have disagreed with their view that blood-alcohol dissipation alone does not create a *per se* exigency rule. In fact, the Court noted specifically that Wisconsin, Oregon and Minnesota have all adopted a *per se* exigency rule. The Supreme Court of Wisconsin stated in *State v. Bohling*, 494 N.W.2d 399,402-406 (Wis. 1993) that they would choose to interpret *Schmerber* as holding that the rapid dissipation of alcohol in the bloodstream alone constitutes a sufficient exigency for a warrantless blood draw to obtain evidence of intoxication following a lawful arrest for a drunk driving related violation. *Bohling* held that a warrantless blood draw is permitted when a person is lawfully arrested for DWI and there is a clear indication that the evidence obtained will produce evidence of intoxication. *Id.* at 406.

Also, the Supreme Court of Oregon held in *State v. Machuca*, 227 P.3d 729, 736 (Or. 2010) that the natural dissipation of a defendant’s blood alcohol is an exigent circumstance that will “ordinarily permit a warrantless blood draw.” The Supreme Court of Minnesota in *State v. Netland*, 762 N.W.2d 202, 212-213 (Minn. 2009), stated that the natural dissipation of alcohol in the blood creates a “single-factor exigent circumstance” that justifies a warrantless, nonconsensual blood draw. The Minnesota Court interpreted the *Schmerber* exigency to rest only on the fact that the “percentage of alcohol in the blood begins to diminish shortly after drinking stops.” *State v. Shriner*, 751 N.W.2d 538,545 (Minn. 2008).

### **The *McNeely* Holding**

In *McNeely*, the Missouri Supreme Court has unequivocally stated that the Court rejects the interpretations of the Minnesota, Wisconsin and Oregon courts. The Court held that *Schmerber* reaffirms that warrantless intrusions of the body are not to be undertaken lightly and that exigency is to be determined by the unique facts and circumstances of each case. The Court stated that *Schmerber* directs lower courts to engage in a totality of the circumstances analysis when determining whether exigency permits a warrantless blood draw. Officers must reasonably believe an emergency exists and there must be “special facts” other than the natural dissipation

of alcohol in the blood before a warrantless blood draw is authorized. The Court did not find any such “special facts” in *McNeely*.

Since the ruling in *McNeely* is directly contradictory to other States, the State in *McNeely* might attempt to present the case to the U.S. Supreme Court by way of *certiorari*. Given that the case deals with a Fourth Amendment right and there is a split amongst the states, such is at least a possibility. However, the Court hears such a small number of *certiorari* cases that it would seem to be unlikely. For now, the State on January 25, 2012 filed a Motion for Rehearing in the Missouri Supreme Court. As of February 29, 2012 that motion has not been ruled upon.

**STATUTORY INTERPRETATION – No infirmity in ordinance which is broader than, but still consistent with, state law**

***City of Creve Coeur v. Nottebrok*, 356 S.W.3d 252 (Mo. App. E.D. 2011)**

The defendant in this case appeals from the trial court’s judgment finding the defendant, or car owner guilty of violating the city of Creve Coeur’s “red light violation” ordinance. The facts in this case are such that the defendant received in the mail a notice of violation of Public Safety Intersection (ticket) informing the car owner that her car had been “illegally present in the intersection during a red light”. Printed on the ticket were three photos: a photo of the rear of the car showing the license plate, a photo of the car owner’s vehicle entering the intersection, and a photo of the car owner’s vehicle exiting the intersection. The ticket identified the car owner’s vehicle by year, manufacturer, model and license plate number. The penalty for the violation was a \$100 fine. The ticket stated that it was a nonmoving violation so points would not be assessed. The back of the ticket explained the administrative review procedure and how a court hearing would be ordered if the owner failed to pay or otherwise failed to respond. The defendant did not respond, and a court hearing was ordered.

The car owner filed a motion to dismiss based on a defect in the institution of the prosecution, alleging that the defendant’s due process rights had been violated because there was no probable cause to believe she had violated the ordinance. It also alleged that the ordinance conflicted with Missouri law because Missouri statutes prescribe a point system for the suspension or revocation of licenses based on moving violations and require municipalities to report points to the Director of Revenue, but this ordinance expressly disallowed the assessment of points. The municipal court denied the motion to dismiss and an application for a trial *de novo* was filed. The circuit court denied the defendant’s motion to dismiss based on the same allegations.

In this appeal the Eastern District addressed each point of the motion to dismiss and affirmed the judgment of the trial court. As to the first issue of due process, the Court stated that this was a civil ordinance and as such it need not provide the heightened procedural protections required by the Fifth, Sixth, and Eighth Amendments of the Constitution. The ordinance was determined to be civil because it included express language indicating the municipality’s intention to consider it civil in nature; the ordinance merely imposed a fine and expressly stated that jail was not a possibility; it also expressed it was a non-point violation and without regard to

the defendant's state of mind; the ordinance punished the car owner not the driver; the ordinance was enacted pursuant to the police power to regulate public safety.

The Court noted that the ordinance at issue in this case was similar to the ordinance at issue in *City of Kansas City v Hertz Corp.*, 499 S.W.2d 449 (Mo.1973) where the Missouri Supreme Court found that a municipal ordinance regulating parking and imposing liability on the owner of the vehicle rather than on the driver of the vehicle did not violate either the U.S. Constitution or the Missouri Constitution. In the case at hand, car owner's liability for this violation was predicated on her status as owner of the vehicle regardless of whether she was the driver of the vehicle at the time of the violation. Thus, the Court here found no due process violation.

As to the second point on the motion to dismiss, that Missouri statutes require points be assessed on moving violations, the Court indicated that this is not a moving violation. The Court stated that any municipal corporation in this state, whether under general or special charter must confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject. Municipalities, however, may enact ordinances that create additional rules of the road or traffic regulations that meet their needs as long as the ordinance's provisions are consistent with and do not conflict with state law.

Missouri ordinances state that two points will be assessed against a person's driver's license for any moving violation of a municipal ordinance not specifically listed in RSMO 302.302. The Eastern District stated that the city was entitled to enact this ordinance to meet the City's needs and traffic conditions as long as the ordinance's provisions were consistent with state law. State law required points to be assessed against either the operator or a non-operator of a vehicle for specific, enumerated traffic offenses. In this case the car owner was not convicted of any enumerated offense either moving or non moving. Furthermore, this was not a moving violation that would be included in the catch all provision because the plain language of the ordinance indicated that the City intended this to be a non-moving violation. The ordinance does not prohibit the "running a red light;" rather, the ordinance prohibits the presence of a vehicle in an intersection when the traffic control signal for that intersection is emitting a steady red signal for the direction of travel or orientation of the vehicle.

Having addressed both points of the motion to dismiss, the Eastern District denied the car owner's motion to dismiss and affirmed the trial judgment.

#### **STATUTORY INTERPRETATION – Prohibition of blood test does not prevent test pursuant to court ordered warrant**

##### ***Covert v. Director of Revenue*, 344 S.W.3d 272 (Mo. App. E.D. 2011)**

The Director of Revenue appeals from the judgment setting aside the suspension of the driving privileges of Carolyn Covert. The Director argues the trial court erred in setting aside the suspension of Covert's driving privileges because the trial court misinterpreted Sections

577.037 and 577.041 because the trial court found the statute required exclusion of blood alcohol evidence obtained pursuant to a court issued warrant.

The facts: Covert was stopped for a traffic violation and the deputy suspected her of DWI. After field sobriety tests, on which she performed poorly, Covert refused to submit to a chemical test. Thus, the deputy requested and received a search warrant for a blood draw. The test results showed Covert's blood alcohol level between .144 and .123 percent. Covert's driving privileges were suspended by a notice of suspension. She filed a request for an administrative hearing.

An administrative hearing was held, and at that hearing, the notice of suspension was sustained. Covert then filed a petition for a trial *de novo*, asserting the decision to suspend her license for having a BAC above .08 was erroneous because the preponderance of the evidence did not show there was probable cause to believe that she was driving a motor vehicle with a BAC above the legal limit and because the administration of the chemical test was improper.

At the trial *de novo* Covert filed a motion for summary judgment, arguing she was entitled to relief because (1) a test to determine her blood alcohol content was given contrary to the dictates of Section 577.041 and (2) the warrant supported blood draw was inadmissible because it was not taken pursuant to the dictates of Section 577.037.

The trial court found that the DOR had the legal right to revoke Covert's license for refusing to submit to a chemical test. However, the trial court found that Section 577.041 provides that if a person under arrest refuses to submit to a chemical test, then none shall be given and as a result, the test results were, in the court's view, inadmissible for the suspension hearing. The trial court set aside the order suspending the driving privileges, but sustained the order revoking the driving privileges for refusing to take a chemical test.

The Director filed a motion to reconsider asserting that Section 577.041 only applies to warrantless testing. The Eastern District agreed with the Director and stated that the trial court had misinterpreted Sections 577.037 and 577.041. The Eastern District stated that those statutes that required the exclusion of blood alcohol evidence pertained only to blood tests ordered on the authority of a law enforcement officer, not court issued warrants for blood draws. The Court relied on *State v. Smith*, 134 S.W.3d 35, 38 (Mo. App E.D.2003) and noted that the Court there had concluded that the provisions of Section 577.041.1 do not prohibit the admission of chemical test results obtained by warrant from a person arrested for driving while intoxicated who has refused a police officer's request to submit to a test. The command that "none shall be given" was addressed only to the authority of law enforcement officers to proceed with a *warrantless* test under Chapter 577. The Court found no reason to limit the holding of *Smith* to a criminal proceeding. Stating that they saw no reason to bar the admission of evidence obtained through the use of a search warrant in compliance with Section 577.041 from an administrative proceeding, the Court found that the trial court erred in setting aside the suspension of the Driver's driving privileges because the trial court misinterpreted Sections 577.037 and 577.041. The judgment of the trial court was reversed.

## **SEARCH AND SEIZURE – Officer’s spotlight directed at defendant’s car is not a search**

***State v. Merchant*, \_\_\_ S.W.3d \_\_\_ (Mo. App. E.D. 2011) ED96435**

This case arose when Officer McKinnon was patrolling in an area known to have a high crime rate. He noticed a vehicle with the head and tail lights on parked in front of an apartment building. Tinted windows obscured any view into the vehicle, so the officer pulled up behind the vehicle at a perpendicular angle and approached the driver’s side while shining a spotlight into the window to see if anyone was inside. The officer stated he “worried something might have been wrong.” Merchant rolled down her window and the officer smelled marijuana. The defendant and her friend were asked to exit the vehicle and a search revealed controlled substances. The defendant and her friend were arrested and gave oral and written statements admitting that they intended to sell the pills seized.

The state filed a complaint charging the defendant, but it was dismissed when the court sustained a motion to suppress the evidence obtained from the vehicle. The state then obtained a grand jury indictment charging the defendant with the same offense. The defense filed a second motion to suppress but the circuit court denied the motion stating that the officer’s spotlight on the car wasn’t a detention or seizure but rather, he approached the vehicle for a routine safety check, and a reasonable suspicion of criminal activity arose as soon as he smelled marijuana from the defendant’s window. The court found the defendant guilty and sentenced her. The defendant now appeals alleging that the court erred in that (1) the State’s grand jury indictment after the same charge had been dismissed was precluded by collateral estoppel and (2) the evidence should be suppressed because the officer lacked reasonable suspicion to detain the Defendant.

On the issue of collateral estoppel, the Eastern District stated that the doctrine was inapplicable because the motion to suppress was interlocutory and there was never a judgment on the merits. The Court stated that the prosecutor can dismiss a case at anytime and refile the charges as he sees fit as long as jeopardy has not attached. Jeopardy only attaches when the trial has begun.

As to the motion to suppress, the Court stated that in addition to an investigatory stop under *Terry*, a law enforcement officer may approach a vehicle for safety reasons, or if a motorist needs assistance so long as the officer can point to reasonable, articulable facts upon which to base his actions. This is law enforcement’s community caretaking function.

The defendant argued that she was detained from the moment the officer approached the car and shined a spotlight into the window. The Court said that the use of a spotlight was not a seizure and the officer was merely conducting a lawful safety check in his community caretaking function. In justifying his actions the officer articulated specific facts that it was nighttime in an area known for auto thefts, narcotics, and other crimes; the car was parked with the lights on and tinted windows obscured his view as to whether the vehicle was occupied as the officer approached, the defendant voluntarily opened her window and the odor of marijuana provided probable cause to search the vehicle.

Thus, the Court found no violation of the Fourth Amendment, and affirmed the trial court's judgment. *Application for transfer filed in Supreme Court on February 8, 2012.*

**SEARCH AND SEIZURE – Ordering defendant to remain in vehicle is permitted based on officer safety concern**

*State v. Drury*, \_\_\_ S.W.3d \_\_\_ (Mo. App. E.D. 2011) ED96754

In this case the trial court found the defendant was detained in violation of the Fourth Amendment, ordering evidence in the case suppressed. The Eastern District reversed, finding the defendant did not have her Fourth Amendment rights violated.

The facts of this case were that Corporal Sevier observed a Ford Ranger traveling over the speed limit and a Ford Escape traveling near the Ranger but not breaking any traffic laws. Cpl. Sevier pulled behind the Ranger and turned on his lights. The Ranger did not stop and Cpl. Sevier requested backup. After about a quarter mile, the Ranger pulled into a driveway and parked next to the Escape already parked in the driveway. This was the home of both drivers. Cpl. Sevier approached the driver of the Ranger, smelled alcohol, and observed other indicators of intoxication. Drury, the sole occupant of the Escape, started to get out of the car and Cpl. Sevier ordered her to remain in her vehicle. She complied and backup arrived. The second officer monitored the defendant while Sevier investigated the driver of the Ranger. The second officer noticed that the defendant showed signs of intoxication. Drury tried to exit her car again and Cpl. Sevier (who was conducting field sobriety tests on the Ranger driver) asked the second officer to move the defendant away from the area because of safety concerns. Drury was eventually arrested for DWI after Cpl. Sevier finished with the Ranger driver. Drury filed a motion to suppress all evidence related to her arrest alleging she was unlawfully detained.

The sole point of this appeal is the motion to suppress which was sustained by the trial court. The State contends that Cpl. Sevier initially detained the defendant for reasons of officer safety and her subsequent detention was based upon probable cause that she had committed an offense. The Eastern District agrees with the state. The Court stated that the facts of the case present two separate and distinct seizures. The first seizure occurred when Cpl. Sevier ordered the defendant to remain in her car until another officer arrived at the scene so that he could investigate and arrest the Ranger driver for DWI. The Officer indicated that this was for officer safety. Officer safety is a weighty and legitimate governmental interest. It is reasonable to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety.

The Court noted that several courts have upheld the constitutionality under the Fourth Amendment of protective detentions where an officer briefly detains an individual to reduce a perceived threat of harm to themselves or others. Protective detention is reasonable when it is for a limited duration and when the individual's presence could create a risk of harm to the officer or the individual detained or the public at large. Cpl. Sevier was a lone officer attempting to make a lawful arrest. It was potentially dangerous to have both individuals out of the car at the same time, especially before the backup officer arrived. Drury was not an uninvolved

passerby. She was traveling behind the vehicle that would not pull over when the officer turned on his lights. Both vehicles parked in the same driveway. Under the facts, Sevier could reasonably conclude that the drivers might have some connection, which potentially posed an even greater threat to the officer.

The second point of seizure occurred when the officers detained her to investigate whether she had operated her vehicle while intoxicated. The officer saw the Escape being driven and parked in the driveway. No one else was in the vehicle and the second officer smelled a strong odor of alcohol coming from Drury immediately as she exited the Escape and further observed her speech slurred. This created reasonable suspicion that Drury was the driver of the Escape and she had driven intoxicated.

The fact that Drury's first detention led to the second detention is inconsequential because the original detention was a reasonable non-investigatory detention. Accordingly, the Eastern District held that the neither the first nor the second seizure violated the Fourth Amendment. The Court reversed and remanded. *Application for transfer filed in the Supreme Court on January 25, 2012.*

## **EVIDENCE – Hearsay permitted when offered for impeachment**

### ***State v. Winfrey*, 337 S.W.3d 1 (Mo. banc 2011)**

Defendant was tried and convicted for first-degree murder and first degree robbery and sentenced to life imprisonment without parole on the murder charge and life imprisonment on the robbery charge, to be served consecutively. Defendant appeals his conviction claiming the trial court erred in sustaining the state's hearsay objection to his proposed cross-examination of Mr. Lewis regarding whether he told another person that he committed the murder.

Mr. Lewis testified at trial that he had helped acquire the gun for the Defendant and had not seen the gun after the time he gave the gun to the defendant. The defense sought to cross-examine the witness about a statement he had made in which he claimed to have shot the murder victim. Defense counsel stated it had a good-faith basis for asking the question based on discovery. After the trial court initially indicated it would allow defense counsel to ask the question, the state objected on the basis that the question sought to elicit hearsay. The court sustained the objection but permitted the defendant to make an offer of proof. After hearing the offer of proof the court adhered to its initial ruling and excluded the proffered question on the ground that it sought to elicit hearsay and no applicable hearsay exception had been established.

On appeal, the court ruled that the trial court erred when it focused solely on whether Mr. Lewis' statement that he shot the victim was relevant to prove the matter asserted, that he killed the victim rather than the defendant. The court held the evidence was also admissible for the non-hearsay purpose of impeaching Mr. Lewis' credibility. Mr. Lewis' statement that he killed the victim was relevant to impeach his credibility as a witness. The court noted, if the witness is willing to lie about committing the crime in the very case in which he is testifying, the witness might be equally willing to testify untruthfully about other matters in the case. Because such an

interest in testifying is probative to the weight the jury gives to the testimony of the witness, the statement showing the interest should be available for the jury's consideration in assessing credibility. When introduced for that purpose, the statement is independently relevant without reference to the truthfulness of the statement, thereby removing it from the hearsay doctrine.

The court noted that in other jurisdictions, courts have held it is reversible error for a trial court to refuse to allow cross-examination of a prosecution witness suspected of committing the crime for which the defendant is on trial regarding the witness' motive for testifying against the defendant. Because of the reasonable probability that the trial court's refusal to allow the cross-examination of Mr. Lewis affected the outcome of the trial, the court reversed the convictions and remanded the case for a new trial.

### **SEARCH AND SEIZURE – License plate computer checks, even without any probable cause, do not violate Fourth Amendment**

***State v. Loyd*, 338 S.W.3d 863 (Mo. App. W.D. 2011)**

Kalvin Loyd appealed his two convictions for driving while revoked. He claimed the trial court erred in overruling his motion to suppress evidence discovered after he was stopped by police, because the officer did not have reasonable suspicion to run a computer check of his license plate number. The Western District ruled, as federal courts have many times, that computer checks of license plate numbers, regardless of whether they are supported by reasonable suspicion or probable cause, do not violate the search and seizure provisions of the Fourth Amendment.

The rationale for this result follows. First, the license plate is out there for all the world to see. There is nothing private about it. Second, the license plate check is not intrusive in any way. It can be done (and usually is done) without the driver even knowing that such a check has taken place. Third, there is no reasonable expectation of privacy for something that is so easily discernable by everyone, citizens and police officers alike.

The U.S. Supreme Court in *New York v. Class*, 475 U.S. 106 (1986) ruled there was no Fourth Amendment violation where police officers actually opened the car door in order to move some papers so as to reveal the VIN on the dash of the defendant's car. So certainly something as unobtrusive as a mere computer check as seen here would pass constitutional muster.

### **ELEMENTS OF THE OFFENSE – Sufficient evidence shown to support burglary conviction**

***State v. Mosby*, 341 S.W.3d 154 (Mo. App. E.D. 2011)**

Dominic Mosby appeals his conviction for second degree burglary. He got nine years as a prior and persistent offender.

Mosby's blood was found at the burglary's point of entry (a broken window leading into an office from which a laptop was stolen). Mosby had also been charged with stealing, but he was acquitted of that charge. Mosby suggested that he may have left the blood at the scene while just hanging around the office. But the owner of the business testified that he had never seen Mosby before.

On his appeal challenging the sufficiency of evidence to support the burglary conviction, the evidence is viewed in a light most favorable to the verdict as provided by the jury. All that must be found is that there was sufficient evidence presented at trial from which a reasonable juror might have found the defendant guilty of the essential elements of the crime. In applying this review standard, the appellate court accepts as true all evidence supporting the jury's verdict, including all favorable inferences drawn from the evidence, and disregards all contrary evidence and inferences.

The Eastern District holds that there was sufficient evidence to establish that Mosby had broken the window and had entered and exited the office for the purpose of stealing. Affirmed.

#### **SELF INCRIMINATION – No *Miranda* warnings required for general on-the-scene investigative inquiries**

##### ***State v. Allred*, 338 S.W.3d 375 (Mo. App. S.D. 2011)**

After receiving a 911 call in which Defendant called in claiming to have killed his wife and threatening to kill himself, the police responded to the scene. While the paramedics attempted to tend to the Defendant's injuries the police asked the Defendant what had happened. The Defendant replied his wife had not been faithful, wouldn't stay off the drugs and had been staying out all hours of the night. Minutes later when asked again what happened the Defendant responded that his wife wouldn't stay off the drugs. Defendant was convicted of murder in the second degree and armed criminal action for the murder of his wife. He appeals his convictions claiming the two statements he made were obtained in violation of his constitutional rights because he had not been given his *Miranda* warnings and therefore, the statements should not have been admitted at trial.

At trial, the Defendant through testimony given at trial affirmed what had been previously stated in the Defendants two statements at the scene of the crime. On appeal the court looked to the ruling in *Miranda* in which the court stated "our decision is not intended to hamper the traditional functions of police officers in investigating crime . . . general on the scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding." In light of the later testimony given by Defendant affirming the statements made at the scene and the holding in *Miranda* the court held there was no error in allowing the testimony of the Defendant from the scene of the crime.

**SELF INCRIMINATION – Whether custodial interrogation exists must take into account the juvenile’s perspective**

***JDB v. North Carolina*, \_\_\_ U.S. \_\_\_ (2011) No. 09-11121, June 16, 2011**

Following two home break-ins JDB, a 13-year-old boy, was pulled from his seventh grade classroom and questioned. The questioning took place in a closed door room with two police officers and two school administrators present. The questioning lasted between 30-45 minutes, during which time the boy was told he needed to do the right thing. He was also told of the possibility of juvenile detention for the crimes. After denying the crimes multiple times, the boy finally admitted to the crimes and gave the name of the other boy involved in the break-ins. Only after this admission did the officers inform the boy that he did not have to answer the officers’ questions, and was free to leave at any time. The bell rang for school to let out and the boy was permitted to leave to catch the bus. The boy was later charged with breaking and entering as well as larceny.

The boy’s Public Defender moved to suppress his statements and the evidence derived therefrom, arguing the boy had been interrogated in a custodial setting without being afforded his *Miranda* warnings and that his statements were involuntary. The trial court denied the motion and adjudicated him delinquent. The North Carolina Court of Appeals as well as the State Supreme Court affirmed. The U.S. Supreme Court granted *certiorari*.

The U.S. Supreme Court looked to whether the age of a child subjected to police questioning is relevant to the custody analysis of *Miranda v. Arizona*. The Court in *Miranda* adopted a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination. Prior to questioning a suspect must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney. However, these rights only occur (and therefore, the reading of these rights becomes necessary) only where a custodial interrogation occurs restricting a person’s freedom enough to render him “in custody.” Whether a suspect is in custody is an objective inquiry asking first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. The Court stated that in some circumstances a child’s age would have affected how a reasonable person in the suspect’s position would perceive his or her freedom to leave.

In the instant case the boy was free to go at any time. However, the Court reasoned that a child will often feel bound to submit to police questioning whereas an adult in the same circumstances would feel free to leave. The Court went further to point out that even the common law has reflected that children are not adults, and this is a relevant circumstance that should be considered. So long as the child’s age was known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer, including age as part of the custody analysis requires officers neither to consider circumstances “unknowable” to them, nor to “anticipate the frailties or idiosyncrasies” of the particular suspect whom they question. In fact, its inclusion in the custody analysis is consistent with the objective nature of the test. Just as police officers are competent to account for other objective circumstances that

are matters of degree (such as the length of questioning or the number of officers present), so too are they competent to evaluate the effect of relative age.

The Court stated that to hold that a child's age is never relevant to whether a suspect has been taken into custody—and thus to ignore the very difference between children and adults—would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults. The case was reversed and remanded to the state courts to address the question of whether the boy was in police custody when the police interrogated him and to use his age as a relevant factor in making that determination.

## **CRIMINAL PROCEDURE – Method of counting days**

### ***Phelps v. State*, 351 S.W. 3d 269 (Mo. App. W. D. 2011)**

The Defendant appealed the circuit court's dismissal of his Rule 24.035 motion for post-conviction relief as untimely. The issue is whether to count the day he was "delivered to the Department of Corrections" (DOC) as the first of the 180-day deadline the defendant has for filing his Rule 24.035 motion. The defendant was delivered to DOC on August 21, 2009. His motion was filed February 17, 2010. The defendant argued that this was the 180<sup>th</sup> day. The State argued that it was the 181<sup>st</sup> day, and, therefore, untimely. The trial court dismissed the motion as untimely.

The Western District, reversed and remanded the case for further proceeding on the 24.035 motion. The appellate court stated that Rule 24.035 motions for post-conviction relief are civil actions and that the rules for computing time are those prescribed by Rule 44.01 (a) of the Rules of Civil Procedure. That rule provides that "the day of the act, event, or default after which the designated period of time begins to run is *not* to be included." Here, the triggering event to start the 180-day deadline was the delivery of the defendant to DOC. Since that day did not count in the computation of the time for filing the Motion, it was timely filed—February 17, 2010 was the 180<sup>th</sup> day.

Arguments by the State that the defendant waived the application of Rule 44.01 and failed to assert it in his motion were not grounds for denying his appeal since Rule 44.01 merely provides how to compute time. The defendant did not waive the applicability of that Rule and did not need to plead it.

## **EVIDENCE – HGN results properly admitted with only a general statement of sufficient training, but mere "appearance of excessive speed" will not support speeding conviction** ***State v. Ostdiek*, 351 S.W. 3d 758 (Mo. App. W.D. 2011)**

In this case the Western District of the Missouri Court of Appeals considered the jurisdiction and authority of a County Deputy Sheriff to make a traffic stop on a **city** street.

Defendant was stopped by a County deputy for speeding on a city street. The stop resulted in charges of DWI, speeding, and possession of drug paraphernalia. The defendant challenged the deputy's authority to effect a traffic stop on a city street without a mutual aid contract between the city and county under §57.101, R.S.Mo. The defendant contended that a deputy cannot arrest a driver for violating a state speeding statute on a city street where there is a city established and posted speed limit.

The appellate court found that the state law adopts the speed limit set by the local government entity, and does not restrict enforcement to law enforcement officers of the local entity. Accordingly, a County deputy can charge a defendant with speeding under state law for driving in excess of the speed limit set by a city upon its street.

The defendant also objected to the admission of the results of the field sobriety horizontal gaze nystagmus (HGN) test due to a foundational issue with the deputy's qualifications. *State v. Hill*, 865 S.W. 2d 702 (Mo. App. 1993) concluded that adequate training to conduct an HGN test consisted of a "minimum of eight hours." When responding to the questions about her hours of HGN training, the Deputy in *Ostdiek* testified to having received "...too many to recall. I've had two or three classes in the past year or two," and, "...all I know is that I have the minimum, or requirement for what we're supposed to have to be able to administer the standardized field sobriety tests." While the deputy never mentioned the "minimum of eight hours" referred to in *Hill*, she had 24 hours of "field sobriety test" training and the test was properly administered to the defendant, so it was properly admitted in evidence.

Finally, the court in *Ostdiek* reversed the conviction for speeding which was based on the deputy's testimony that the defendant's vehicle "just appeared" to be going faster than her vehicle and the other vehicles, and that she could not recall how fast that was. While visual estimates alone can support a speeding conviction, the court found this testimony to be insufficient to sustain the speeding conviction.

#### **EVIDENCE – Exclusion of exhibits showing criminal charges against non-witness informant neither erroneous nor prejudicial to defendant**

##### ***State v. Graham*, 345 S.W.3d 385 (Mo. App. S.D. 2011)**

Defendant was convicted by a jury of selling forty Valium pills to an undercover law enforcement officer, in violation of 195.211 RSMo. The defendant appeals from the judgment, claiming the trial court erred in excluding two exhibits that he offered. Those exhibits contained certified copies of felony criminal charges against a non-witness informant, who had initiated and arranged the sale. The charges against the non-witness informant were pending at the time of the sale.

The State objected to the introduction of the exhibits, because the informant was not called as a witness at the trial, which defense counsel admitted. The trial court sustained the State's objection to the defendant's attempted introduction of the exhibits.

On appeal, the defendant stated that the exhibits were relevant because they would corroborate the defendant's defense of entrapment by showing that the informant was motivated to get the defendant to sell drugs and thereby lessen his own punishment on the cases he had pending.

While the Court of Appeals agreed with the defendant that the defendant's exhibits were logically relevant to the defendant's defense of entrapment, and that the records actually showed a possible motive to "solicit" or "encourage" the defendant to sell prescription drugs to an officer, (in order for the witness to obtain leniency on his own pending criminal charges), the Court decided that the exhibits were logically relevant, but they were not legally relevant because the exhibits were "cumulative" to other admitted evidence.

The Court reasoned that the exhibits' cumulative nature outweighed their probative value. The admitted evidence in the case was undisputed that the arresting officer was working with the informant as an undercover officer, and the informant initiated and arranged the sale in conversations with the defendant that the officer did not participate in or record.

The Court also held that, even if the exhibits were legally relevant and should have been admitted, the error was harmless "beyond a reasonable doubt," and therefore did not prejudice the defendant. The evidence was overwhelming and uncontroverted that the defendant was ready and willing to sell prescription medicine to the undercover officer illegally - - a fact that precludes entrapment and makes any error with respect to the evidence that the informant "solicited" and "encouraged" the defendant harmless beyond a reasonable doubt.

The trial court's judgment was affirmed.

## **EVIDENCE – Bad Acts, Crimes, Analyzed, Closing Argument**

### ***State v. Brown, 353 S.W.3d 412 (Mo. App. S.D. 2011)***

Defendant was convicted by a jury of domestic assault in the first degree, armed criminal action, and felony resisting arrest by flight. The defendant was sentenced by the trial court as a prior and persistent offender on the domestic assault and ACA charges, but the court set aside the jury verdict on the felony resisting arrest by flight.

The testimony in the case showed that the defendant and victim were living together and had a violent argument which escalated into the defendant stabbing the victim eleven times with a knife. The victim got away from the defendant and police were called. The police arrived to find the victim lying in the street bleeding from several wounds to her head, neck and body. She identified the defendant as the person who stabbed her. After back-up officers arrived, the police entered the residence of the defendant and victim, but they did not find the defendant. While police were in the residence another officer saw the defendant leaving the scene on foot and the police gave chase. The defendant was apprehended a short time later at his mother's apartment.

The first point on appeal involved the defendant's contention that the court improperly allowed testimony to be heard by the jury relating to his conduct and certain statements he made to the arresting officer after his arrest and transport from his mother's apartment to the local police department. Prior to the trial, the court heard a motion in limine on this issue and ruled in favor of the State. The defendant renewed his objection to this testimony at trial. It was again overruled by the trial court. The jury was told by the arresting officer:

**"He got belligerent. He was attempting to demean me. I believe at one point he called me a bitch, and he was just pretty well uncooperative."**

Judge Gary Lynch, writing for the Southern District, agreed with the defendant's argument that the challenged testimony was not logically relevant to any material fact in the case and that its small probative value was outweighed by its prejudicial effect on the jury. Judge Lynch cited several Missouri cases which have held that:

**"evidence of a defendant's behavior after an arrest has been made and the defendant is in custody is not logically relevant in proving a charge of resisting arrest."**

Judge Lynch then examined the issue of whether the erroneous admission of this testimony was so prejudicial that it deprived the defendant of a fair trial on his other charges. The Court of Appeals found that the evidence was not highlighted during the trial, was not argued during the closing argument, and did not affect the jury in light of the overwhelming evidence of the defendant's guilt of the charges of domestic assault in the first degree and armed criminal action.

The second point raised by the defendant on appeal was a plain error review of testimony relating to his prior convictions. On direct examination, the defendant told the jury that he had been convicted for felony selling controlled substances, several convictions for felony possession of controlled substances and misdemeanor convictions for failure to pay child support and resisting arrest by flight. He also admitted he was on parole at the time of the alleged crimes at issue in his trial. During direct examination by his attorney the defendant also described his regular use of marijuana, methamphetamines and Xanax with the victim. He also described the victim's drug use on the day of the stabbing to further his defense that she stabbed herself while in a "drug induced frenzy."

On cross-examination the prosecutor asked defendant what specific controlled substances he sold or possessed at the time of his prior convictions. The defendant objected to this line of questioning but was overruled by the trial judge. Judge Lynch noted that **Missouri Revised Statute** 491.050 and Missouri case-law allows the State to inquire into the facts of the conviction, the nature of the charge, place and date of the occurrence, and sentence imposed as long as the State does not unduly emphasize the details. However, the Court of Appeals did not rule on this claimed error because the Court felt that the evidence of guilt was so overwhelming, that even if it was error to allow the inquiry, it would not result in a reversal of the jury's verdict.

The Court also agreed that the prosecutor's closing argument referencing the defendant's prior convictions for drug sales and possession in response to a defense argument that **"it comes down now to two things, whether you believe defendant or whether you believe the victim. The defendant is the one that's been honest with you about his drug use"** was not asking the

jury to convict the defendant because he was a drug dealer, but was a legitimate argument on the defendant's credibility as a witness on the issue of his own drug use and that of the victim.

## **CRIMINAL PROCEDURE – Spoken judgment prevails over later written judgment**

### ***State v. Primm*, 347 S.W.3d 66 (Mo. banc 2011)**

Appellant Daniel M. Primm appeals his conviction on ten counts of sexual abuse involving his grandniece, T.B. Evidence of uncharged crimes was properly admitted under an exception allowing for evidence of motive and to provide a coherent picture of the events that transpired, and there was sufficient evidence to support each count of statutory rape. While the judgment is affirmed in all other respects, the cause is remanded for the entry of a *nunc pro tunc* order correcting the written judgment.

The Eastern District opinion on this case was in the 2011 Regional Seminar materials at page 36. Since the judgment was affirmed by the Supreme Court on all counts, we need to look now why the case was remanded for a *nunc pro tunc* order (to correct an omission in the record).

Appellant asserts that the trial court plainly erred in entering a written judgment that differed from its oral pronouncement. The trial court orally pronounced that:

“Counts (I), (II), (VII), (VIII) and (X) will run concurrent with each other. Counts (III), (V), and (IX) will run concurrent with each other, but will run consecutive to the other counts.”

The written judgment, however, stated that Count X shall run consecutive to counts I, III, IV, VII, VIII, and X. The State concedes this inconsistency and that the written judgment should be corrected with a *nunc pro tunc* order, pursuant to Rule 29.12 (c).

In municipal courts the following rules apply (Re: Missouri 2010 Bench Book)  
Rule 37.64 ( g ) Sentence and Judgment

(g) Conviction of Two or More Sentences. When pronouncing sentence, the judge shall state whether the sentence shall run consecutively or concurrently with sentences on one or more ordinance violations for which defendant is being sentenced or for which defendant has been previously sentenced. If the judge fails to do so at the time of pronouncing the sentences, the respective sentences shall run concurrently.

### **Rule 37.67 Judgment Set Aside**

(c) Clerical mistakes in the record and errors in the record arising from oversight or omission may be corrected by the court any time on the motion of and after such notice, if any, as the court orders.

Bottom line: What we say from the bench is the law of the case – so make sure any subsequent written Judgment which purports to reflect the Court’s determination or sentence precisely matches what was orally declared earlier.

### **ELEMENTS OF THE OFFENSE – Weapons charge fails where firearm in question not put into evidence because never found**

***Williams v. State*, \_\_\_ S.W.3d \_\_\_ (Mo. App. E.D. 2011) ED95386**

Rollan Williams (hereinafter, “Movant”) appeals from the motion court’s judgment denying his Rule 29.15 post-conviction motion without an evidentiary hearing. In the underlying case, Movant was found guilty of robbery in the first degree, Section 569.020 RSMo, armed criminal action, Section 571.015, and unlawful use of a weapon, Section 571.030. The trial court sentenced Movant to thirty years’ imprisonment. This Court affirmed his conviction. *State v. Williams*, 291 S.W.3d 373 (Mo. App. E.D. 2009). Movant thereafter filed his motion, pursuant to Rule 29.15, alleging his trial counsel failed to call a witness and his appellate counsel failed to raise a meritorious issue on appeal. The Eastern District affirms in part, and reverses and remands for an evidentiary hearing, in part.

The following facts were adduced at trial and judicially determined in Movant’s direct appeal: Movant went to the home of D.W., to whom he had been married for over ten years (but they were separated at the time). After entering D.W.’s home, Movant and D.W. began arguing in the kitchen. At some point during the argument, Movant pulled out a gun and directed it at D.W.’s temple.

Both of D.W.’s adult sons heard the commotion. B.Z. and T.R. entered the kitchen and saw Movant holding a gun to their mother’s head. Movant then directed the gun at B.Z. and T.R. Movant searched D.W.’s purse. B.Z. asked Movant what he needed; Movant demanded money. Once B.Z. gave Movant money, Movant threatened to kill all of them. He did not go through with the threat, and he thereafter fled the scene.

The Eastern District held that the Movant made a viable claim of appellate counsel’s effectiveness in failing to challenge the sufficiency of the evidence, in that the gun the defendant exhibited (which was never recovered), was never shown to be readily capable of lethal use. After all, if it was never recovered, it could not be put into evidence. And if it was not in the evidence, how could the jury conclude that it was readily capable of lethal use?

### **Firearm Not Presumed Lethal**

The statute defines the offense of unlawful use of a weapon to include displaying a weapon readily capable of lethal use. Movant used a gun that was never found, and so not shown to be readily capable of lethal use, so trial counsel may well have been ineffective for appealing his client’s conviction for armed criminal action without pressing that point. To

prevail based on a claim that counsel was ineffective for failing to call a witness, witness must negate an element of State's charge, not merely impeach State's witness.

**Held: Affirmed in part, reversed and remanded in part.** While a gun generally is capable of lethal use, there was no specific proof regarding the particular gun that appellant had exhibited. The state was required to adduce some evidence that appellant's gun was at the time readily capable of lethal use. *Application for transfer filed in the Supreme Court on January 5, 2012.*

#### **D.W.I. – No probable cause to conclude that defendant was the driver**

##### ***Chamberlain v. Director of Revenue, 342 S.W.3d 334 (Mo. App. S.D. 2011)***

On a petition for review, the trial court held that the Director of Revenue failed to establish probable cause that the Defendant was driving while intoxicated. DOR appealed the ruling.

Defendant was involved in a one vehicle accident and taken to the hospital. After an unknown period of time, an officer went to the hospital to question the Defendant. The officer noted an odor of alcohol, bloodshot eyes and an uncooperative demeanor. Defendant then failed the horizontal gaze nystagmus test, the officer arrested him and requested a blood test, which Defendant refused.

The trial court refused to admit hearsay testimony regarding the radio dispatch from officers at the scene of the accident. Therefore, the Director failed to establish that the Defendant was driving the vehicle.

The appellate court first held that the Director failed to make the necessary offer of proof at trial to preserve the error for appeal. The appellate court then analyzed the law regarding probable cause to arrest. The trial court must determine: 1. was the person arrested or stopped; 2. did the officer have "reasonable grounds" to believe the driver was under the influence; 3. did the driver refuse the test? In this case, the issue was whether the arresting officer had "reasonable grounds," based on the particular facts and circumstances, to warrant a "prudent person's belief" that a suspect has committed an offense.

In this case, the officer knew the following: 1. there was a one-car accident; 2. one person was injured; and 3. the ambulance driver said he was transporting a person from Iron County. The Director also argued that at some point, the officer knew the vehicle was registered to the Defendant. However, the appellate court noted that the timing of this knowledge was not established at trial.

The appellate court ruled that the Director had not established that the trial court's ruling was clearly erroneous, noting that the trial court was free to believe or disbelieve the testimony presented at trial.

**EVIDENCE – No error in admission of hearsay where declarant is in court and available for cross-examination**

***State v. Garth*, 352 S.W.3d 644 (Mo. App. E.D. 2011)**

Defendant Garth was convicted by a jury of first degree domestic assault and sentenced to life in prison. Garth raised three points on appeal; namely, that the trial court erred in (1) denying his request for counsel (2) failing to prevent the State from introducing hearsay testimony, and (3) allowing medical records and appellant's physician testimony in violation of his physician-patient privilege, all resulting in manifest injustice.

Garth was living with his girl friend, decided to break off the relationship and went to her house to collect his things. They argued and Garth poured gasoline on the victim and lit the gas as the victim tried to run away. Victim rolled on floor and Garth helped put the fire out with a rug. Garth refused to take the victim to the hospital for fear of going to jail, and did so only after the victim promised to tell hospital personnel that she injured herself. At the hospital, victim stated she caused the injuries. Victim then went into shock and lost consciousness, suffering burns to her hands, arms, back, torso, neck and face, and later received skin grafts on her hands.

Victim's brother visited hospital and was informed that victim injured herself, which brother did not believe. Victim had tubes down her throat and was unable to speak, so brother asked her to blink twice if somebody had done this to her and she blinked twice. Brother asked victim to blink once if it was Garth and she blinked once, so hospital called police. Police observed large burn marks in several places at house, a burned rug at bottom of basement steps and a gas can in basement. Victim, once able to speak, told police that appellant had tried to kill her by setting her on fire.

As to the first point of denying Garth's request for counsel, Garth was appointed a public defender but did not think she was representing him fairly so he moved to represent himself. Trial court and prosecutor told Garth he should get counsel and he was later offered co-counsel at the pre-trial stage. The trial court explained on multiple occasions the provisions of the waiver form and the numerous problems the appellant would have in self representation, and stating he could get counsel at any time. Garth waived his right to counsel, and only after the State rested its case did he ask for counsel. Trial court refused saying it was too late. Garth argues the trial court erred by allowing him to waive his right to counsel without advising him of possible defenses, or advising him he would lose his right to claim ineffective assistance of counsel. The court dismisses the first prong of this argument by stating that requiring the trial court to conduct an investigation in order to determine what defenses would be applicable would be untenable and contrary to the role of the court as an impartial arbiter. As to the second prong, the court held that the Appellant was questioned extensively regarding his competency to knowingly and intelligently waive his right to counsel and he knowingly and intelligently waived his right to counsel. On the issue of not allowing counsel on request, the Court stated that a trial court is not categorically required to allow a criminal defendant to withdraw a previously entered, valid waiver of counsel at any time. *State v. Richardson*, 304 S.W.3d 280, 287-290 (Mo. App. S.D. 2010).

On the second point, Appellant argued that the court erred by allowing the State to introduce hearsay testimony. At trial the brother of the victim testified that he asked his sister to blink twice if somebody did this to her and she blinked twice. He then testified that he asked her to blink once if it was Appellant and she blinked once. Appellant argues this is inadmissible hearsay because he could not confront the victim about these assertions about her nonverbal statement because she had no memory of making it. The court denied this point and found no plain error. The court cited *State v. Steele*, 314 S.W.3d 845, 850-851, stating that prejudice will not be found from the admission of hearsay testimony where the declarant was also a witness at trial, testified on the same matter, and was subject to cross-examination.

Finally, Appellant argued that the trial court erred by allowing testimony of an emergency room physician, in violation of his physician-patient privilege. The physician testified that Appellant's burns were not consistent with Appellant's story of protecting himself from a furnace fire. The court rejected this argument because appellant had not objected to this testimony when it was introduced and therefore Garth had waived his physician-patient privilege. In addition, he could not show the trial results would have been any different if the evidence was excluded.

#### **DEPARTMENT OF REVENUE REVOCATION CASES – Burden of proof is on Director to prove all elements for revocation**

##### ***Hilkemeyer v. Director of Revenue*, 353 S.W.3d 62 (Mo. App. S.D. 2011)**

This case deals with the burden of proof in a trial *de novo* in Circuit Court for having a chemical test result above the legal limit after being arrested for driving while intoxicated. The issue is on whom the burden of proof rests to prove that the statute has been complied with. The burden of proof is on the Director of Revenue, and the driver may prevail even if he presents no evidence at all. The trial court's ruling in favor of the driver is affirmed.

The witness testified that he did not directly observe the driver for 15 minutes prior to administering the breath test. He observed the driver indirectly for a portion of that time based on his driving of the police vehicle and setting up the breath testing machine. He used his peripheral vision to observe the driver during that time.

The Director alleges that once a prima facie case is made, the burden then shifts to the driver to rebut the evidence. The appellate court extensively cites *White v. Director of Revenue*, 321 S.W.3d 298 (Mo. banc 2010). White held that "no provision in section 302.535 creates a presumption that the Director's evidence establishing a prima facie case is true or shifts his burden to the driver to introduce evidence to rebut such (a) presumption." *Id.* at 306. Driver had no obligation to prove that something occurred during the fifteen-minute observation period that could have interfered with the results of the breathalyzer test.

**SELF INCRIMINATION – State bears burden to establish by a preponderance that defendant knowingly waived *Miranda* rights**

*State v. Sparkling*, \_\_\_\_ S.W.3d \_\_\_\_ (Mo. App. W.D. 2011) WD73737

Pursuant to Section 547.200.1(3), the State filed an interlocutory appeal from an Order of the Circuit Court granting a Motion to Suppress Statements. Defendant was under arrest for four felonies and requested a meeting with a detective. Sparkling alleged that he had not been advised of his *Miranda* rights and that he had not knowingly and intelligently waived those rights.

At the suppression hearing, the detective testified that he read the *Miranda* warning, using the standard “Statement of Rights” form. There are blank lines on the form for the defendant to initial. Defendant was not asked to initial and he did not do so. Defendant was directed to sign the form and he did so without reading the form. The defendant was asked if he understood his rights, but he did not express his understanding. The interview was videotaped and is part of the record, reviewed by the trial court and the appellate court.

The video reflects that Sparkling was in custody, handcuffed and present in an interrogation room with the detective. The video reflects that the detective read Sparkling his *Miranda* rights; however, when asked if he understood those rights, Sparkling in no way indicated that he understood them. When told to sign the form, the defendant did so. He was not asked if he could read or that he take the time to read the form. The video clearly shows that he did not read the form and just signed same. The form reflects that the defendant is to initial opposite each right, and that was not done.

The trial court concluded that the State had not carried its burden to prove that Sparkling waived his *Miranda* rights with the full awareness of the nature of the rights he was abandoning and the consequence of the abandonment. The trial court found that the State made no record that Sparkling understood his rights: “There is no indication that (Sparkling) could read and write English. (Sparkling) was not invited to read the statement and was not given time to read the form. He did not verbalize his understanding of the rights. He simply signed where he was told to sign.” The trial court suppressed the custodial statements.

The issue is whether the State met its burden to establish waiver by a preponderance of the evidence. The question of the validity of a waiver is one of fact, and it will not be overturned unless it is clearly erroneous. “The State introduced no evidence of Sparkling’s age, experience, education, background, intelligence, his familiarity with the criminal justice system, or whether he had the basic intellectual capacity to understand the warnings given him the nature of his Fifth Amendment rights, and the consequences of waiving those rights.” Furthermore, the detective could articulate no basis for concluding that Sparkling understood his rights.

The suppression of statements was not error. *Application for transfer filed in the Supreme Court on February 14, 2012.*

**D.W.I. – No limited driving privilege where driver has been convicted of leaving scene of accident**

***Mansheim v. Director*, \_\_\_ S.W.3d \_\_\_ (Mo. App. E.D. 2011) ED96624**

David Mansheim was on a ten year denial when he sought limited driving privileges after having served at least three years of his ten year denial. It seems that Mansheim had a conviction for leaving the scene of an accident in 2002. Under Section 302.309.3(6)(d), he was ineligible for limited driving privileges by reason of the leaving the scene conviction. The trial court granted limited driving privileges. The Director appeals based on such ineligibility.

The Eastern District holds that the trial court acted in excess of its authority when it granted the limited driving privileges. Even though Mansheim's conviction was about a decade old, the Court notes that the perpetual nature of the bar is plain. Furthermore, the question of whether that policy is a sound one is an issue for the General Assembly, not for the courts to decide. Reversed. The Director's denial of limited driving privileges is upheld. *Case disposed, mandate sent on February 15, 2012.*

**STATUTORY INTERPRETATION – What constitutes a “building” for purposes of burglary statute**

***State v. Collins*, \_\_\_ S.W.3d \_\_\_ (Mo. App. E.D. 2011) ED96069**

Anthony Collins appeals his conviction for second degree burglary. Collins had unlawfully entered an electric company fenced property and stole copper wire which was stored underneath a “truck shelter”. The issue in the case is whether the truck shelter qualifies as a “building” for the purposes of the burglary statute. The shelter had only one wall, no doors or windows, and it was always open. It also had a roof and two half walls along with one partial wall. Since this was a “substantially enclosed structure with several walls connected by a common roof”, the Court concluded that it met the definition of a “building” as found in the burglary statute. Affirmed. *Case disposed, mandate sent on February 15, 2012.*

**CRIMINAL PROCEDURE – Oral declaration of judgment overrides later written judgment**

***Shaw v State*, 347 S.W.3d 142 (Mo. App. S.D. 2011)**

Gerald Shaw appealed the denial of his rule 24.035 motion seeking to correct the written judgment concerning his convictions for kidnapping and stealing. The written judgment stated that Shaw's sentences of fifteen and four years were to be served consecutively. However, that written judgment was inconsistent with the oral pronouncement of sentence by the Court, in which the judge had stated that the two sentences were to run concurrently. The Western District held that the oral pronouncement was controlling, and ordered the written judgment corrected to conform to the oral pronouncement of sentence.

In March of 2007 Shaw had entered guilty pleas to charges of kidnapping and stealing. In exchange for the guilty pleas to those two charges, the State agreed to dismiss other pending charges, and also agreed to allow a sentencing assessment report (SAR) to be prepared. The State intended to recommend a 15-year sentence on the kidnapping and a consecutive 4-year sentence on the stealing. Defense counsel intended to ask for a lesser sentence.

The official transcript of the sentencing hearing at the guilty plea showed that the Judge had recited the plea agreement indicating that the sentences were to run concurrently, and that when the Judge imposed the sentences he stated “those sentences to run concurrent”. The official transcript did not reflect any objection by the prosecutor. The evidentiary hearing on the post-conviction motion was heard before the same judge who had accepted the Defendant’s guilty pleas and imposed the sentences. At that hearing the Judge stated that he “thought” he had imposed a consecutive sentence, and the Defendant’s plea counsel and prosecuting attorney both testified that they believed the sentences were to run consecutively to one another.

The Western District noted that it is well settled that “the written sentence and judgment in a criminal case may not deviate from the Court’s oral pronouncement of sentence.” *Hastings v. State*, 308 S.W.3d 792, 796 (Mo. App. 2010); *St. ex. rel Zinna v. Steal*, 301 S.W.3d 510, 514 (Mo. banc 2010). The oral sentence controls, and the written judgment is erroneous. *State v. Patterson*, 959 S.W.2d 940 (Mo. App. 1998). While the sentencing court may amend its oral pronouncement of sentence until it is reduced to written judgment by returning the Defendant to court for resentencing, the trial court in this case did not do so.

The appellate court rejected the State’s argument that the motion court “implicitly found” that there was an error in the transcript of the sentencing hearing. Although the judge stated that he “thought” he had imposed consecutive sentences, there is an established procedure for challenging the accuracy of a transcript under Missouri Supreme Court Rule 30.04(g). If the State believed there was an error in the transcript from the sentencing hearing it was essential for the State to formally ask the trial court to settle and approve the transcript pursuant to that rule. When the State did not do so, the appellate court is bound by the certified transcript from the sentencing hearing.

#### **ELEMENTS OF THE OFFENSE – Constructive possession of burglary tools established by surrounding facts at the scene**

##### ***State v Mills*, 352 S.W.3d 640 (Mo. App E.D. 2011)**

Brad Mills appealed his conviction for possession of burglar’s tools. The Eastern District held that where Defendant was found squatting in a bathroom facing a sink where there was a large hole with copper piping sticking out, there was copper piping and plaster on the floor, and officers seized a hammer and crowbar which had been right in front of Defendant as well as a back pack containing other tools from the floor in the bathroom, the evidence was sufficient to convict the Defendant of possession of burglar’s tools.

The evidence was that officers responding to a reported burglary in progress heard thumping noises from inside an apartment and observed pry marks on the locked area of the front door. Upon opening the door they found Mills squatting in the bathroom, facing a sink area where there was a large hole with copper piping sticking out. There was copper piping and plaster on the floor. Officers seized a hammer and crowbar from underneath the sink which had been right in front of Mills. Officer seized a back pack containing pliers, a box cutter, wire cutters, a flat head screwdriver, a flash light, gloves and a leveler. Officers found no one else in the apartment.

Mills was charged with second degree burglary and possession of burglar's tools. At a jury trial, the trial court granted Mills' motion for acquittal on the burglary charge at the close of the State's case because the State had not shown that Mills did not have permission to be in the apartment. The jury returned a verdict of guilty on the remaining charge of possession of burglar's tools.

Mills argued that the trial court erred in denying his motion for judgment of acquittal on the charge of possession of burglar's tools, because there was insufficient evidence to support a finding that the tools found in the bathroom were in his custody, control or possession, or that he possessed those tools with purpose to use them to make unlawful entry into a building.

The Eastern District held that the jury could easily infer from the thumping noises and where the tools were located that Mills himself was using them just before the officers entered. The Court also held that the jury could consider the pry marks on the front door as relevant to the issue of whether Mills had possessed the tools with the intention to use them to forcibly enter the apartment, even though Mills had been acquitted on the burglary charge. The Court found the facts to be sufficient for a reasonable jury to find that Mills had constructive possession of the burglar's tools, even though the tools were not found on his person.

## **ELEMENTS OF THE OFFENSE – Toy dagger constitutes “dangerous” weapon**

### ***State v. Harrel*, 342 S.W. 3d 908 (Mo. App. S.D. 2011)**

A jury found defendant guilty of committing the class B felony of first-degree burglary and the unclassified felony of armed criminal action by unlawfully entering a church (with the purpose to commit stealing) while armed with a deadly weapon. Defendant entered the church with a “Sword of Narnia” replica that a friend's children had won at a carnival. The sword was apparently used to break a window to gain entry to the church and rooms within the church.

On appeal defendant argued that the replica sword did not meet the statutory definition of a “deadly weapon” as contained in Section 556.061 (10). Defendant characterized the replica sword as “a Chronicles of Narnia movie replica sword, won by children as a prize at a carnival, it is metal but does not have sharpened edges and is not designed as a weapon.” The State conceded that the only way the replica sword meets the statutory definition of deadly weapon is if it qualifies as a “dagger.” The replica sword was made of solid metal and was 22 ½ inches long when measured from the tip of its blade to the bottom of its hilt. The blade was 18 inches long. It weighed more than a pound and had a sharp point and sharpened edges.

The Southern District found the evidence was sufficient to support the jury's conclusion that the replica sword was a deadly weapon because its characteristics met the criteria established for a dagger.

## **STATUTORY INTERPRETATION – Meaning of “period of suspension”**

***Morse v. Director of Revenue*, 353 S.W.3d 643 (Mo. banc 2011)**

Morse was arrested for DWI. Her license was administratively suspended for 90 days. She completed the 90 day suspension (302.505.2) and the other requirements for reinstatement by completing a substance abuse traffic offender program, showing proof of liability insurance coverage and paying reinstatement fees. As part of the same incident, the state had filed criminal DWI charges. In that matter she received a suspended imposition of sentence (SIS).

Subsequently Morse violated the terms of her probation, her probation was revoked, and she was convicted of DWI. After the DWI conviction the director assessed 8 points, gave her a 30 day suspension (Section 302.304) and required her to once again complete a substance abuse traffic offender program, show proof of liability insurance coverage and pay reinstatement fees. Morse filed a petition for *de novo* review. The director conceded that Section 302.525.4 requires the director to credit Morse's first administrative suspension against the second administrative suspension because both suspensions arose from the same DWI arrest, but argued that Morse still had to meet the other requirements.

The trial court ruled in favor of Morse and said she didn't have to do any of it again. On appeal the appellate court agreed that the first suspension must be credited to the second and the director conceded that Section 302.540 provides that completion of the treatment program must be credited if, as in this case, two suspensions arise out of same occurrence. The director argued and the appellate court ruled that Morse is *still* obligated to offer proof of insurance and to pay reinstatement fees to obtain reinstatement because neither Section 302.525.4 nor Section 302.540 relieves her of that obligation.

**CRIMINAL PROCEDURE – Suppression of evidence is appealable, but exclusion of evidence is not**

***State v. Burns*, 339 S.W.3d 570 (Mo App. W.D. 2011)**

On appeal pursuant to Section 547.200, State appeals trial court's order excluding admission at trial of medical records including any test on Defendant's blood or urine in DWI case. Court dismissed the appeal.

State filed notice that they planned to introduce Defendant's medical records under the business records exception to hearsay to prove defendant's intoxication. In response, Defendant filed a "Motion to Suppress or in the Alternative Motion in Limine." Court granted Defendant's Motion. State appeals under Section 547.200. Defendant filed a motion to dismiss the appeal contending that Section 547.200 permits appeal after trial court has suppressed due to illegality of the seizure. Defendant contented that trial court's order was merely a pretrial in limine ruling with respect to the admissibility of evidence pursuant to an evidentiary rule or principle.

The right to appeal is purely statutory. Section 547.200 gives the State the right to appeal in criminal cases "from any order or judgment the substantive effect of which results in . . . suppressing evidence." Suppressing evidence is not the same as exclusion of evidence on the basis of a rule of evidence. Suppression is a term used for evidence which has been illegally

obtained; not objectionable as violating any rule of evidence. The State's right to appeal is restricted to those cases where illegally obtained evidence is at issue.

Trial Court held that the State must introduce the foundation required by the State Code of Regulations for any lab tests concerning levels of alcohol or the presence of drugs in a sample to be admissible. This ruling was based on a rule of evidence, not a claim of illegal search and seizure. Therefore, the State did not have a right to seek an interlocutory appeal under Section 547.200.

The title of the motion, Motion to Suppress or in the Alternative Motion in Limine, was of no consequence to the Court. The legal character of a pleading is determined by the subject matter, not by the title.

The Eastern District dismissed the appeal finding that this was a ruling in Limine and interlocutory only; and is subject to change during course of trial. Motion in Limine preserves nothing for appeal.

State was not without recourse. This Court stated that the State could pursue a writ of prohibition. A remedial writ is the proper route to review interlocutory orders in a criminal case.

#### **CRIMINAL PROCEDURE – Appeal dismissed unless there is a “judgment”**

##### ***Coe v. Coe*, 349 S.W.3d 433 (Mo. App. S.D. 2011)**

Appellant, acting *pro se*, seeks review of Trial Court's handwritten docket entry dismissing the case due to Appellant's failure to comply with discovery. The Eastern District dismissed the appeal because the docket sheet entry was not a “judgment” under Rule 74.01(a).

A prerequisite to appellate review is that there be a final judgment. Only judgments that are final may be appealed. A final judgment is one that disposes all issues regarding all parties, leaving nothing for future consideration.

Rule 74.01(a) requires a writing filed and signed by the judge and denominated “judgment” or “decree.” This may be a separate document or an entry on the docket sheet.

The docket entry in question falls short of this standard. It was not denominated “judgment,” nor was it signed or initialed by the judge. Court failed to enter a separate document bearing the markers of final judgment.

Where there is no judgment, appeal is to be dismissed.

#### **CRIMINAL PROCEDURE – Trial court loses jurisdiction after sentencing except in certain limited circumstances**

***State v. Joordens*, 347 S.W.3d 98 (Mo App. W.D. 2011)**

Defendant pled guilty to two counts of possession of child pornography, one count of statutory rape in the second degree, and one count of statutory sodomy in the second degree. Circuit Court ordered sentences to run consecutively. Court vacated this judgment and altered the sentence twice. Defendant appeals. Remanded for vacatur of all orders entered after original sentencing judgment.

After Defendant plead guilty and was sentenced on January 6, 2010. Defendant filed a Motion to Reconsider on January 12, 2010 requesting the Circuit Court “on its own motion” grant him probation under the 120 day call back with shock incarceration under Section 559.115.

On March 4, 2010, Circuit Court set aside the January 6, 2010 judgment and sentences, and resented Defendant to the same prison terms, but ordered the sentences run concurrently instead of consecutively.

On March 23, 2010, Trial Court vacated the amended judgment of March 4, 2010 and reinstated the January 6, 2010 judgment, which had ordered Defendant’s sentences to run consecutively. Defendant appealed.

A judgment in a criminal case occurs when the sentence is entered. The Circuit Court entered the sentence on January 6, 2010.

When a judgment becomes final, the court’s ability to act is halted and appellate court’s ability to review commences. Once judgment and sentencing occur in a criminal proceeding, trial court has exhausted its jurisdiction. No further action in that case can occur except when otherwise provided by statute or rule.

Rule 29.13 gives a court the authority to set aside a final judgment when (1) within 30 days after the entry of judgment and prior to the filing of the transcript of the record in the appellate court, the court may set aside the judgment if (a) facts stated in indictment or information do not constitute of offense, or (b) that the court is without jurisdiction of the offense charged, or (2) with consent of defendant, order a new trial before the entry of judgment and imposition of sentence but not later than thirty days after the verdict of the jury is returned.

Rule 29.13 does not apply in this fact situation. The court’s jurisdiction ended when it entered the judgment and sentence on January 6, 2010.

Defendant argued that the State waived any claim of error, because it failed to challenge the court’s authority in the proceeding to amend the judgment and resentence him. The Western District found State’s failure to object does not give legitimacy to the trial court acting outside of its authority.

Remanded to vacate all orders entered after the January 6, 2010 judgment and sentence.

## **SEARCH AND SEIZURE – Seizure upheld where there is good faith reliance on warrant by police**

***State v. Wilbers*, 347 S.W.3d 552 (Mo. App. W.D. 2011)**

Defendant appeals possession marijuana with intent to distribute and possession of methamphetamine. Defendant alleges that warrant affidavit's failure to contain a specific date and time as to when police informant actually saw drugs in defendant's home precluded finding of probable cause necessary to issue search warrant.

Affidavit in question alleged that "within the past 48 hours (as of 3:00 PM July 1, 2008), I have had contact with a confidential informant that has been inside the residence..." Defendant challenges the affidavit because the affidavit does not state when the informant observed drugs in the residence.

The Fourth Amendment to the United States Constitution guarantees that no warrant shall issue except upon probable cause supported by oath or affirmation. A neutral judge must determine probable cause from the totality of the circumstances. In determining whether probable cause exists, the judge must make a practical, common-sense decision whether there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Common sense is a key ingredient in considering the absence or presence of probable cause. Reliance upon factual allegations necessarily entails some degree of reliability upon credibility of the source. The concepts of veracity, reliability, and basis of knowledge are relevant considerations, but not entirely separate and independent requirements. Under the totality of the circumstances method of analysis, a deficiency in one area may be compensated with a strong showing of the other or by some other indicia of reliability. In dealing with probable cause, we deal with probabilities not certainties.

Probable cause to search exists when, at the time the judge issues the warrant, there are reasonably trustworthy facts which, given the totality of the circumstances, are sufficient to lead a prudent person to believe that the items sought constitute fruits, instrumentalities, or evidence of crime and that they will be present at the time and place of the search.

In this case, Affiant only stated that he spoke with the informant within the past 48 hours. There was simply no such time-connected information referring the reader as to the date the informant actually observed the methamphetamine.

This problem could have been cured under the totality-of-the-circumstances, if the Affiant had provided very specific detailed locations. But the Western District could not ignore the Affiant's complete failure to denote when the informant observed the illegal activity described. No probable cause existed for the search.

On the other hand, the evidence need not be excluded if the officers executed the search warrant in good faith. To trigger the exclusionary rule, police conduct must be sufficiently

deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. Suppression remains appropriate remedy in 4 situations:

- 1) If the affiant provides information he knows or should know is false
- 2) Judge wholly abandons his judicial role
- 3) If the affidavit is so lacking in probable cause as to render official belief in its existence entirely unreasonable; or
- 4) If the warrant is facially deficient the executing officers cannot reasonably presume it to be valid.

The question becomes whether the affidavit so lacks indicia of probable cause that it would be entirely unreasonable for a reasonably well-trained officer to rely upon it.

In this case, the affidavit provides a statement of affiant's law enforcement experience, past reliability of the confidential informant, a prior investigation of Defendant by law enforcement, and possession by Defendant of a controlled substance at some unknown or unstated time. A reasonable well-trained officer's reliance on this poorly-drafted affidavit cannot be considered entirely unreasonable. Conviction affirmed.

#### **CRIMINAL PROCEDURE – No ineffective assistance of counsel by mere failure to follow *pro hac vice* requirements**

##### ***Roberts v. State*, 356 S.W.3d 196 (Mo. App. W.D. 2011)**

Defendant seeks post conviction relief alleging ineffective assistance of counsel after murder in the second degree and armed criminal action convictions. Denial of relief affirmed.

Defendant alleges (1) Trial counsel failed to adequately prepare for and put on mitigation evidence at sentencing hearing (2) Defendant was denied her constitutional right to counsel because her trial counsel was not a duly licensed attorney (3) Trial counsel was ineffective because he failed to comply with Supreme Court Rule 9.03 pertaining to visiting attorneys and was so deficient in his overall performance as to deny Defendant her constitutional right to counsel and (4) Trial counsel persuaded Defendant to waive jury sentencing.

As to Point 1 (mitigation evidence at sentencing hearing), the Western District found that choice of witnesses is a matter of trial strategy and trial counsel cannot be found ineffective for failing to present cumulative evidence.

As to Points 2 and 3, defendant alleged that her trial counsel failed to comply with Rule 9.03 to secure *pro hac vice* admission in Missouri. Trial counsel was admitted to practice law in Kansas.

Mere noncompliance with the requirements of Rule 9.03 does not by itself constitute constitutional error. Defendant provided evidence of numerous complaints to the Kansas Bar regarding her trial counsel, as well as evidence of trial counsel's subsequent suspension, then

disbarment. Defendant failed to offer authority for the proposition that complaints against counsel filed by clients in other cases bears relates to ineffectiveness of counsel. Court considered this argument abandoned.

Defendant further claimed that trial counsel was ineffective for not deposing three eyewitnesses, filed no pre-trial motions, called no defense witnesses at trial, had no experience in front of the trial judge, and did not meet with Defendant between her trial and sentencing. Defendant failed to prove prejudice, where trial counsel effectively obtained an acquittal on murder in the first degree.

As to Point 4, Defendant claims that trial counsel was ineffective for persuading Defendant to waive jury sentencing. The decision to waive a jury trial is a matter of trial strategy and does not provide a basis for post-conviction relief.

Denial of 29.15 relief is affirmed.

#### **SEARCH AND SEIZURE – Zoning officer may inspect defendant’s premises from street and adjacent properties**

*City of Independence v. Cady*, 349 S.W.3d 419 (Mo. App. W.D. 2011)

Defendant was convicted in Circuit Court of violating city code provisions regarding maintenance of residential property. Affirmed.

On January, 10, 2008, Defendant was cited for (1) uncontained trash and rubbish, (2) overgrown vegetation, and (3) building maintenance issues, including broken and missing doors and windows.

On September 4, 2009, Officer returned to determine if violations had been abated. Officer knocked on Defendant’s door, but there was no response. From the street and the front porch, the officer was able to view visible Code violations on the property. Officer completed a notice of code violations and posted a copy of the notice which included an administrative hearing date and time and a correction date on the door of the residence. Defendant did not attend the hearing. Officer returned to the property after the date and issued three tickets for (1) improper storage of refuse; (2) weed control; and (3) building maintenance. Defendant was convicted and sought review to circuit court. Defendant was convicted of all three charges and fined.

Defendant argued the circuit court erred in admitting testimony and photographs that resulted from the officer’s warrantless inspection of his property. Therefore, evidence obtained in violation of his Fourth Amendment right against unlawful search and seizure should have been excluded.

Officer testified that the overgrown vegetation, improper storage, and building maintenance violations were clearly visible from the street and neighboring property. The charges resulted from a citizen complaint.

The Municipal Code permits officers to observe violations on the exterior areas of the property that are open to public view and to post notices on the property.

Defendant did not challenge the constitutionality of the provisions under the Fourth Amendment.

Officer complied with the procedures by limiting her observations to those areas of Defendant's property that were visible to the public and the subject of the neighborhood complaints. Defendant never alleged that the officer entered an area of his property that was not open to the public view.

An officer is permitted without a warrant to investigate a crime or to conduct official business at the residence in places where the public is invited. This applies to curtilage that is open to public view. No privacy expectation exists in areas that are visible from outside the property.

Nothing in the record suggests that Defendant took steps to enclose the yard or otherwise shield his yard or house from public view. Conviction affirmed.

#### **ELEMENTS OF THE OFFENSE – Legality of Park Ranger stop outside of park**

*State v. Murphy*, \_\_\_ S.W.3d \_\_\_ (Mo. App. S.D. 2011) SD31067

Summarizing “the facts adduced at the bench trial...in the light most favorable to the verdict [of guilty],” a Missouri Department of Natural Resources Park Ranger (Ranger) clocked defendant traveling 57 MPH in a 35 MPH zone within the confines of Sam A. Baker State Park. Ranger pulled over defendant and cited him for speeding. The trial court found defendant guilty and fined him \$150.00.

On appeal, in addition to sufficiency of the evidence and sufficiency of the information challenges, Defendant claims that the ranger was without legal authority to stop defendant because the ranger was not within the confines of the state park **both** when he observed defendant **and** when he stopped defendant. The Southern District affirms the conviction holding that any claim that defendant was improperly stopped (including the claim that the ranger was outside of his territorial jurisdiction at the time of the stop) should have been raised by a pre-trial motion to suppress (which it was not) and, even then, “the most compelling evidence of the crime, Ranger’s measuring of Defendant’s speed with the radar gun, occurred before the stop. This evidence would not be suppressed, even if Ranger’s stop was invalid.” *Application for Transfer filed in Supreme Court on December 14, 2011. Docketed under No. SC92193.*

## **ELEMENTS OF THE OFFENSE – Accomplice liability established by facts in record**

### ***State v. Agee*, 350 S.W.3d 83 (Mo. App. S.D. 2011)**

Jaclyn Agee was convicted of one count of the class A felony of murder in the second degree, one count of the B felony burglary in the first degree, one count of the A felony robbery in the first degree, 3 C felony counts for felonious restraint, 3 B felony counts for facilitating a kidnapping, and 8 counts of Armed Criminal Action. Defendant was sentenced to fifteen years with a lot of concurrent time. Defendant appeals all convictions. Issues on appeal include Defendant's accomplice liability relative to several counts. Note that Missouri no longer recognizes the terms "accessory before the fact" or "accessory after the fact" – only "accomplice liability."

Facts are: Defendant and boyfriend Roy rented a mobile home from Bub and his girlfriend Dianne. When Defendant and Roy vacated the home, Bub refused to return their security deposit due to the poor condition of the home when Defendant and Roy left it. Roy angrily confronted Bub on several occasions about the deposit, but Bub refused to refund it. On May 7, 2008, Bub comes home around 2:30 p.m. to find Defendant and Roy in Bub's house. Upon entering, Roy pointed Bub's own loaded rifle at him and took him to the back bedroom where Defendant was waiting with Bub's loaded 12 gauge shot-gun. Defendant and Roy then bound Bub's hands and feet with duct tape. Defendant and Roy had already ransacked Bub's house.

Agee and Roy tell Bub that his girlfriend Dianne is an informant who had been telling the police about their drug activity, and that they had been sent by the drug dealers to kill Bub and Dianne. Bub tells them he does not know what they are talking about and further, tells them he will sign over all his property to them to spare his life. At 8:00 p.m. Dianne comes home with Bub's cousin Scott, and his girlfriend Leeoma. Defendant shoves Bub to the floor and puts the shotgun to the back of his head while Roy hides behind the bedroom door. Dianne approaches the bedroom and Roy tells her he wants to talk to her. Dianne runs back to the living room yelling for Scott to call the police. Roy follows her and shoots her in the back of the head, killing her. Roy then pointed at Scott and said, "You're next." Luckily for Scott, the Defendant then got Roy calmed down with no more shooting.

Roy then forced Scott and Leeoma to give him their cell phones and Defendant forced them at gunpoint into the back bedroom. Defendant stood watch while Scott and Leeoma were bound with duct tape. Defendant and Roy continued to tell Scott and Leeoma that they were from the mob and that they were being watched and were to make sure they completed their assignment of killing Dianne and Bub. For several hours, Defendant and Roy screamed at Scott and Leeoma, threatened to kill them, and pointed guns in their faces.

Defendant and Roy then agreed to release Scott and Leeoma after telling them that the police were in on the deal and that the police would kill them if they reported the crime. They also told them that they would "hunt them down," and would kill them and their children if they reported the murder of Dianne.

Defendant and Roy decided to drive Scott and Leeoma into the woods and turn them loose. They take Dianne's car after having loaded Dianne's body into the trunk. Defendant and Roy then forced Bub, Scott and Leeoma into the car and headed for the woods. After driving around, Defendant and Roy released Scott and Leeoma into the woods. Scott and Leeoma hid. They were later picked up by a passer-by and went to the authorities. Defendant and Roy then drove around with Bub until they ran out of gas. Defendant and Roy gave Bub a crowbar and told him to dig a grave for Dianne's body. No grave was dug. Defendant and Roy then decided to burn the vehicle with Dianne's body inside. Bub told them he would help them burn the car and promised not to tell anyone about the murder. Bub helped start the fire. He then ran away and Defendant and Roy fled in the opposite direction. Bub located a nearby home and called the police. Defendant and Roy were apprehended after a short standoff with law enforcement. The above charges against Defendant were then filed. After a jury trial, Agee was convicted of all charges.

Agee appeals contending, *inter alia*, that there was insufficient evidence to support convictions for accomplice liability on her part. First, she contends that the victims were removed from Bub's house so that they could be released, not to facilitate the commission of any felony or flight thereafter pursuant to Section 565.110 R.S.Mo. (Missouri's kidnapping statute.) The Southern District rejects this assertion – Scott and Leeoma were taken from the residence into the woods, Defendant and Roy took their cell phones, and threatened them and their children's lives in order to facilitate their own flight from law enforcement and the detection of Dianne's murder. There was ample evidence to support Agee's conviction for three counts of kidnapping for the purpose of facilitating her flight from the scene of the crime she and Roy had committed

Next, Defendant argued that there was insufficient evidence to support a conviction for second degree murder, since the felony of burglary was complete when they entered the home and therefore, that felony could not be used to support a conviction for felony murder. The Southern District again says no to that contention. The state alleged that Defendant "acting together with Roy" committed the burglary, and that in the course thereof, Dianne was shot. "The state need not show an intent to kill, but only that the homicide occurred in the perpetration or attempted perpetration of a felony. It is the intent to commit the underlying felony, not the intent to kill, that is the gravamen of the felony murder offense. . . . The state must prove every element of the underlying felony beyond a reasonable doubt. . . . The underlying felony is necessary in proving the intent element of felony murder. The felony murder rules make the underlying felony not an element of the felony murder but rather a means of proving the felonious intent for murder." The state proved that Defendant and Roy were continuously in the house, engaging in the crime of burglary when remaining unlawfully in Bub's home for the purpose of stealing, when Dianne was killed. The burglary was not complete at the time Dianne was shot – rather, it was an ongoing crime.

Finally, Defendant challenges her convictions for ACA arguing that there was no evidence that she "aided" Roy in the commission of ACA in that her liability for the murder was predicated on her participation in burglary not for any intent that Roy kill Dianne. Again the Southern District rejects the argument. "To be liable under accomplice liability, the evidence does not have to show a defendant's specific knowledge of which crime his co-participant will commit. Rather, a defendant who embarks on a course of criminal conduct with others is

responsible for those crimes which he could reasonably anticipate would be part of that conduct. Proof of any form of participation by the defendant in the crime is sufficient to support a conviction. . . . The law of accomplice liability imputes the criminal agency of Roy to Defendant. The evidence clearly showed Defendant's active participation in the first degree burglary which resulted in the killing of Dianne, even though defendant was not the one wielding the gun which killed the victim. Due to her involvement in the burglary and the felony murder committed by Roy, Defendant was properly convicted of ACA for "acting together with Roy" in committing felony murder. All convictions were affirmed.

**EVIDENCE – Witness need not know the technology of video offered – just that it is an accurate portrayal of events shown**

***State v. McNear*, 343 S.W.3d 703 (Mo. App. S.D. 2011)**

Defendant appealed his conviction for armed criminal action. The facts in this case are not pertinent to the points raised on appeal. Defendant, at trial, only preserved one point raised on appeal which related to the admission by the trial court of a store surveillance video of the incident (hereinafter "the video") without proper foundation.

The Court of Appeals reviewed the matter under a plain error standard. The video in question was admitted during direct examination of the victim. The only testimony elicited by the prosecution from the victim was that ". . . he (the victim) had previously viewed the video" and that it was "a fair and accurate recording" of the relevant events. At that point defense counsel objected to the video's admission for lack of foundation (the contention being that the witness was perhaps not fully knowledgeable about the technology involved in the store's surveillance system). The trial court, following argument by both counsel, overruled the objection. The prosecution then re-offered the exhibit and defense counsel made no objection to admission of the video. Thereafter, defense counsel renewed his objection as to the victim's knowledge and ability to testify sufficiently to establish the foundation for the video. Following additional argument the video was admitted and played for the jury.

The Southern District, prior to its holding, announced that it could refuse to review this issue inasmuch as defense counsel's statement of "no objection" most probably constituted an affirmative waiver of appellate review of the issue. But the court chose to continue, and found no error, plain or otherwise, holding that "one must [only] establish that the video accurately represents what it purports to show and may do so through any witness familiar with the subject matter and competent to testify from personal observation." 343 S.W.3d at 705.

**EVIDENCE – Commenting on defendant's failure to testify almost always reversible error**

***State v. O'Neal*, 353 S.W.3d 433 (Mo. App. E.D. 2011)**

Defendant appealed his conviction by jury of attempted stealing. The facts here are not pertinent to the point raised on appeal. Defendant's sole point on appeal was that the trial court abused its discretion in overruling his motion for mistrial, following statements by the prosecutor in the presence of the jury, and on the record. The Prosecutor had declared that the Defendant's medical records should not be admitted because, "[i]t's simply a way to avoid the defendant testifying [and] . . . a way of entering statements that he would have made [while testifying]." Defendant contends that the prosecutor's statements violated his due process rights, his right to a fair trial before an impartial jury, and his right to be free of penalty for not testifying.

It should also be noted that the admission of the medical records at issue was addressed during a recess after the State rested, outside of the jury's hearing. At that time the court ruled that the records would be allowed, but limited defense counsel's right to interpret them for the jury. Following the prosecutor's statements, defense counsel moved for a mistrial and his request was denied.

The appellate court reviewed this matter for abuse of discretion to determine if the trial court's failure to declare a mistrial was clearly against the logic of the circumstances before it resulting in a ruling that is so arbitrary and unreasonable as to shock one's sense of justice. Following review of the factual circumstance present at the trial the Eastern District found the a prosecutor's reference to the defendants failure to testify in the presence of the jury violated the defendant's rights to freedom from self-incrimination and to refrain from testifying, and that defense counsel's request for mistrial should have been granted. Finding that the trial court abused its discretion by not granting a mistrial, the conviction was reversed and remanded for retrial.

## **EVIDENCE – Discovery requirement overrides Sunshine Law provisions**

### ***State v. Jackson*, 353 S.W.3d 657 (Mo. App. S.D. 2011)**

The Greene County Prosecutor on behalf of Springfield Police Officer Hill instituted prosecution against Norman L. Jackson for second degree assault of a police officer and fleeing the scene of a lawful detention. Defendant Jackson claimed he defended himself by excessive force by Officer Hill. Jackson felt that his claim could possibly be shown by the personnel records of the police department.

Counsel for Jackson filed discovery seeking any written or recorded statements and existing memoranda summarizing "all or part of all witnesses." Officer Hill provided reports to the internal affairs investigation of the Springfield, Missouri Police Department. Disclosure of the reports was denied per the Sunshine Statute.

Next, counsel filed a subpoena duces tecum to the Springfield Police Department's custodian of records for all investigation notes, papers, reports, pictures, finding regarding mandatory investigation and recording complaints of excessive force against Officer Hill. The Springfield Police Department refused to provide that part of the record as a "personnel record" and "a privileged closed document." The trial Court declined to examine the form *in camera*, both before and at the close of the case.

On appeal, the Southern District, held that Rule 25.03 (A) (1) is mandatory to avoid surprise and is designed to assist Defendant to prepare a case in litigation. The State is to produce information in the possession or control of other government units needed for discovery in litigation.

**D.W.I. – Conviction reversed where there was no clear proof that defendant was driving while impaired at time of accident**

***State v. Hatfield*, 351 S.W.3d 774 (Mo App. W.D. 2011)**

Defendant appeals his conviction after a jury trial for Driving While Intoxicated. Defendant argued that the evidence was insufficient to establish beyond a reasonable doubt that he drove his vehicle while intoxicated. The Court of Appeals reversed.

The arresting deputy was dispatched to 814 Ward Road in Raymore for an accident. There he found a car parked in a driveway of a home with front end damage, rut marks in a ditch and a damaged fence. The defendant was standing outside the vehicle. When asked what happened, defendant responded “I lost it making the turn.” The deputy observed multiple indicators the defendant was intoxicated. When asked for his driver’s license defendant told the deputy he was revoked. After confirming defendant’s license was revoked, the deputy arrested him for Driving While Revoked and for suspicion of DWI. At the police station, defendant refused to perform field sobriety tests and refused the breath test.

Defendant argued on appeal that the state had failed to establish that he was under the influence of alcohol at the time he was operating a motor vehicle and the Court of Appeals agreed. The Court stated there was sufficient evidence that the defendant had driven the car, and that he was intoxicated, but no evidence that he was intoxicated when he drove the car. Even defendant conceded there was sufficient evidence to show he was driving when the accident occurred. But without evidence establishing when he last operated the car, the evidence was not enough to support a DWI conviction. Citing *State v. Wilson*, 273 S.W.3d 80 the Court said, “(T)ime is an element of importance that the state must prove to sustain its burden to show that a driver drove while intoxicated.”

“(A) DWI conviction cannot be sustained where the state fails to present evidence to support the inference that the defendant’s intoxication was observed within a reasonable period of time following the defendant’s operation of a motor vehicle, and that the defendant did not become intoxicated in the interim.” Later the court stated “to sustain a DWI conviction the State must establish, through direct or circumstantial evidence, the temporal connection between the defendant’s last operation of a motor vehicle and his observed intoxication.”

The court stated the case law on this issue is fact specific and reviewed a number of similar cases, so it may be a good idea to read this case in its entirety to compare the numerous cases cited.

**ELEMENTS OF THE OFFENSE – Accomplice liability discussed in detail**

***State v. Wilson*, \_\_\_ S.W.3d \_\_\_ (Mo. App. W.D. 2011) WD72958**

Defendant was convicted of first-degree drug trafficking and possession of a controlled substance with intent to deliver, distribute and sell. The jury was instructed on the trafficking charge under a theory of accomplice liability. Therefore, Wilson could be found guilty if he acted with other(s) with the common purpose of committing the offense or if he aided or encouraged other(s) in committing the offense. On appeal, Wilson challenged the sufficiency of the evidence to support his conviction on the first-degree drug trafficking charge.

The standard of review for this point is whether the State made a submissible case by presenting sufficient evidence from which a reasonable juror could find the defendant guilty beyond a reasonable doubt. Thus, the court's analysis is very fact-driven.

However, the court discusses the criminal doctrine of "accomplice liability" and cites all the relevant case law. As seen by the facts of this case and the broad statements of the law, the doctrine has a much wider application than just driving the get-a-way car. While reading below, consider how the doctrine might apply to municipal violations such as shoplifting, assaults, building violations, etc.

The doctrine of accomplice liability applies to any number of potential acts intended by one person to assist another individual in criminal conduct. A person is deemed criminally responsible for the conduct of others when, with the purpose of promoting the commission of an offense, he aids or agrees to aid or attempts to aid other person(s) in planning, committing, or attempting to commit the offense. The evidence need not directly place the defendant in the act of committing the crime. The law imputes to the defendant the criminal agency of his accomplices. Any evidence that shows affirmative participation by aiding or encouraging another person in the commission of the crime is sufficient to support a finding of guilt. "Encouragement" is the equivalent of conduct that by any means countenances or approves the criminal actions of others.

Here, the defendant had more than a gram of crack cocaine in his pocket when police searched him, there was a baggie with 1.6 grams of crack cocaine on the floor directly beneath the table where he had been sitting, and he was found with three other known drug dealers in a kitchen replete with drugs and drug manufacturing paraphernalia. This was more than mere presence at a crime scene, which alone would not support guilt under accomplice liability. The jury could reasonably infer that Wilson intended to deliver and sell the crack cocaine. Under a theory of accomplice liability for drug trafficking, the State was not required to prove that Wilson personally participated in manufacturing the crack cocaine in order to convict him. *Case disposed, mandate sent on November 16, 2011.*

**ELEMENTS OF THE OFFENSE – Mere presence in the neighborhood will not support burglary conviction**

***State v. Smith*, 355 S.W.3d 560 (Mo. App. E.D. 2012)**

John Smith appeals his conviction of first degree-burglary. After a jury found him guilty, the court found the defendant to be a prior and persistent offender and sentenced the defendant to serve five years in the Missouri Department of Corrections. The defendant appeals raising two points: (1) He alleges that the court erred in denying his motion for judgment of acquittal and (2) he contends that the State failed to prove its case beyond a reasonable doubt. The Eastern District found that the evidence was insufficient to support a conviction, reversed the judgment and remanded the case for discharge of the defendant.

At issue is whether the facts supported a conviction for burglary in the first-degree. The facts presented to the jury were that the Defendant walked through the yard of the victim. Shortly thereafter someone gained entry to the victim's home through an exterior door, causing damage to the door and the alarm to sound. The victim ran out of the house to a neighbor's house after she heard someone yell "hello" from inside the house. The victim never saw anyone other than the individual fitting the defendant's description in her yard around the time of the incident. About two blocks from the victim's home the police detained the defendant who was later identified by the victim as the man who had walked through her yard. The defendant alleges that this evidence was insufficient for a finding of guilt beyond a reasonable doubt.

The Eastern District held that the conviction of the defendant was based upon coincidence and was insufficient for a reasonable juror to find the defendant guilty beyond a reasonable doubt. The court reasoned that the conviction was based upon a number of coincidences. The fact that the defendant was walking through the victim's yard, someone breaking into her home and the defendant's presence some two blocks away shortly after the break-in does not amount to proof beyond a reasonable doubt.

The court relied upon *State v. Grim*, 854 S.W.2d 403, 405 (Mo. banc 1993) wherein it was held that the reviewing court must accept as true all evidence favorable to the State, including all inferences drawn from the evidence and should disregard all evidence and inferences to the contrary. Also, the court must determine whether there is sufficient evidence from which a reasonable jury might have found the defendant guilty beyond a reasonable doubt. *Id.* The court stated that when the charge outlines the act that constitutes a crime, the State must prove that act. *State v. Edsall*, 781 S.W. 2d 561, 564 (Mo. App. W. D. 1987). In the case at bar, the act of unlawfully entering an inhabitable structure, is the act that the State must prove. The Court reasoned since the State failed to prove that the defendant unlawfully entered the victim's home, the jury could not find guilt beyond a reasonable doubt; thus, the Court could not uphold a conviction for first degree burglary or first degree trespass.

### **CRIMINAL PROCEDURE – Defendant being “pretty sure” it was contraband provides factual basis to accept guilty plea**

#### ***Evans v. State*, 350 S.W.3d 29 (Mo. App. W.D. 2011)**

Penney Evans entered a plea of guilty to the charge of possession of a controlled substance with the intent to distribute. The court followed the plea agreement between the parties and sentenced defendant to serve fifteen years in the Missouri Department of Corrections, but suspended the execution of the sentence and placed the defendant on probation for five years

with no early release. After violating her probation, the court revoked her probation, executed on the sentence and ordered that the defendant serve the fifteen years of imprisonment. Defendant's sole issue on appeal is that the court erred in denying her Rule 24.035 motion and accepted her guilty plea without first determining that there was factual basis for the plea. The Western District agreed with the motion court and affirmed the judgment of conviction.

The defendant states that her guilty plea was not done voluntarily, knowingly and intelligently because the court did not comply with Rule 24.02 (e). She specifically argues that insufficient facts were presented to the court to establish that the substance delivered was a controlled substance. At the plea the defendant was asked whether the substance she delivered to the undercover agent was methamphetamine and she replied, "I don't know but I'm pretty sure it was." When asked if she wished to have the court to "find out for sure" if the substance was methamphetamine she declined the court's offer.

The Western District held that the defendant's statements made during the plea proved that she had prior experience with methamphetamine and her failure to give the court any reason to question whether the substance was methamphetamine formed a factual basis for the plea. The court held that it is not necessary for the State to produce official lab results in drug or alcohol cases when the defendant makes an unequivocal acceptance of the factual requisites necessary to establish the elements of the offense charged. The court reasoned that to rule differently would make it virtually impossible for a court to accept a guilty plea in any drug or alcohol unless there was an official lab test of the substance.

In affirming the motion court's ruling the Western District analyzed Rule 24.02 (e) which provides that the "court shall not enter judgment upon a plea of guilty unless it determines that there is a factual basis for the plea." Also, the court relied upon *Mitchell v. State*, 337 S.W.3d 68, 69 which held that if a plea of guilty is voluntarily and understandingly made and unequivocal as to the factual elements necessary to constitute the offense, the plea forms the factual basis for the guilty plea. Further, the court followed the ruling *State v. Shafer*, 969 S.W.2d 719, 734 (Mo. banc 1998) where it was held if the defendant voluntarily and understandably accepts that the elements of an offense are true during the plea, a factual basis for the plea has been established.

## **CONSTITUTIONAL LAW – Convictions of stalking and violating an order of protection for the same conduct do not violate double jeopardy**

### ***State v. Stewart*, 343 S.W.3d 373 (Mo. App. S.D. 2011)**

Kendal Stewart appeals the trial court's judgment of conviction for 1) stalking and 2) violating a full order of protection. The trial court sentenced the defendant to consecutive five-year sentences on the convictions. Stewart asserts error by the trial court in accepting the jury verdicts because the convictions constituted double jeopardy in that the conviction on the second offense (violation of protection order) required the jury to find that Defendant knowingly

violated the terms and conditions of a protection order by stalking the victim by doing the same acts during the same time period as alleged in the first offense (stalking).

The evidence at trial included a long history of the defendant subjecting his wife (eventually, ex-wife) to abuse, assaults, threats and stalking. After the ex-wife was granted a full order of protection effective for one year, the Defendant's acts did not cease. The victim spent time living in domestic violence shelters and the Defendant found her and followed her. The full order was extended for an additional year and yet the Defendant continued his actions including hammering on the side of her house in the middle of the night, writing his name in the snow on her car and breaking into her house to steal all her clothes. She stated she was "petrified" of the Defendant due to the previous assaults and had significant emotional issues as a result. She saw a psychiatrist monthly and had been diagnosed with battered-women's syndrome and post-traumatic depression.

Defendant represented himself at trial and failed to properly object to certain evidence (though he tried to attack the evidence on appeal) and failed to fully preserve the double jeopardy claim for appeal because he failed to raise it at trial. Therefore, the review he requested on appeal was for plain error. Plain error review of the double jeopardy issue was allowed due to that right being constitutional. Relief for plain error will not be granted unless it is demonstrated that the error so substantially affected the defendant's rights that a manifest injustice or a miscarriage of justice would inexorably result absent a correction of the error.

The Southern District upheld the convictions. Defendant argued that stalking is a lesser-included offense of the crime of violating an order of protection. However, the court disagreed because the crime of stalking required a finding that Defendant's actions caused substantial emotional distress to the victim while the crime of violation of the order of protection (even by the same stalking only) required a finding that Defendant purposely and repeatedly engaged in a course of conduct that caused alarm to the victim, in that she had to be in fear of danger of physical harm. Therefore the elements of the two separate crimes are not the same and stalking is not a lesser-included offense of the crime of violating an order of protection.

Defendant next argued that stalking was merely a specific instance of the general conduct of violation of an order of protection. However, the court found the legislature's decision to impose a criminal penalty for violating an order of protection is designed to promote a respect for, and a willingness to abide by, a judicial decision. Again the court dismissed the Defendant's argument and found the two offenses to be distinct and the convictions of both offenses not a double jeopardy violation.

Finally, the defendant argued the trial court committed plain error by allowing testimony and exhibits regarding evidence of prior physical abuse. The court swiftly dismissed this argument as well because the prior acts of physical abuse were logically and legally relevant to prove that Defendant's stalking was purposeful and could have caused the victim to suffer substantial emotional distress (element of the stalking offense) and alarm (element of violation of protection order offense). The court also, therefore ruled the probative value of this evidence outweighed any prejudicial effect upon Defendant.

## **CONSTITUTIONAL LAW – No double jeopardy where two separate statutory prohibitions are violated in one act**

### ***State v. Walker*, 352 S.W.3d 385 (Mo. App. E.D. 2011)**

Defendant was convicted by a jury of both forcible rape and statutory rape for one act of rape. The Circuit Court sentenced Defendant as a prior and persistent offender to two (2) consecutive ten (10) year sentences. He asserted a double jeopardy argument on appeal, saying the court erred in sentencing him on two counts for the same act.

The Defendant was charged with forcible rape and statutory rape as a result of a single act of sexual intercourse with a girl less than twelve (12) years of age.

The Eastern District provided an analysis of double jeopardy in Missouri and discussed the state of the law in Missouri. Missouri follows the separate or several offense rule, rather than the same transaction rule. This means a defendant can be charged with and convicted of several offenses arising from the same transaction, incident or set of facts without offending the double jeopardy clause. In effect, the legislature has provided the ability to convict a defendant for multiple offenses for the same act if the defendant has in fact committed separate crimes.

The Court then analyzed the cumulative effect of the punishment in this case and whether the legislature intended this punishment. In this case the court concluded the victim was afforded special protections due to her age. The Court further concluded that because of this special status and the fact statutory rape and forcible rape are separated indicate the legislature viewed these as separate crimes which could and should be punished separately, even if occurring in the same incident. The court ultimately concluded the Defendant in this case clearly violated two separate sections of the statute in question and thus, he could be punished separately for each offense.

This seems relevant to Municipal practice where often one stop will produce multiple violations. Although rape cases are not heard in municipal courts, the double jeopardy lesson here is well taken.

## **ELEMENTS OF THE OFFENSE - Insufficient evidence to support trespass and resisting arrest convictions**

### ***State v. Caldwell*, 352 S.W.3d 378 (Mo. App. W.D. 2011)**

**Facts:** Caldwell was charged by Information with (1) trespass in the first degree for knowingly remaining unlawfully upon real property located at 160 NW 251, Warrensburg, Johnson County, Missouri, property belonging to the University of Central Missouri (“University”), after being given actual notice of such trespass; and (2) with resisting arrest by refusing to exit her vehicle at the request of an officer. A jury trial was held on September 20, 2010 and defendant was convicted of both charges. The uncontested evidence at trial was as follows:

On May 13, 2008, Caldwell (a student at the University who was studying for a master's degree in aviation), was at the airport sitting in her vehicle. Airport hours of operation were 7:00a.m. to 9:00 p.m., and the only vehicles allowed after hours were people in the airplanes served by the Airport.

Officer Gary Schmidt, an officer with the University, approached Caldwell's vehicle at 7:34 p.m. to inquire as to her business there. She stated she was studying and it wasn't the University's property. Officer Schmidt informed her it *was* University property, and there was little further communication from Caldwell.

Officer Schmidt returned at 10:01 p.m. with another officer. They asked Caldwell numerous times to leave, and then they asked her to exit her vehicle five times; all to no avail. With the assistance of a uniformed officer from the Warrensburg Police Department, entry was made with the use of a "Slim Jim". Caldwell was taken into custody at that time. There was no evidence that Caldwell was violent or threatened violence to the officers before being taken into custody.

Caldwell orally moved for judgment of acquittal at the close of the State's evidence and at the close of all the evidence. Both motions were denied. The jury found Caldwell guilty of trespass in the first degree and resisting arrest. After trial, Caldwell filed a motion for judgment of acquittal notwithstanding the verdict of the jury or, in the alternative, for a new trial, assigning as error the trial court's failure to grant Caldwell's motions for acquittal, thereby preserving the issue for appellate review.

"The essence of an action for trespass is violation of possession. Accordingly, to support an action for trespass, the party making the claim must have legal right to possession." *Int'l Bhd. Of Elec. Workers v. Monsess*, 335 S. W. 3d 105, 108 This element was established when Officer Schmidt specifically told Caldwell that she was on University property. Therefore, the State proved that the University owned the Airport premises and thus, had the legal right to the possession of the Airport premises where Caldwell was parked.

However, at trial, there was no evidence presented that identified the address in the Information as the Airport. Nor was there any evidence presented which tied the address "160 Northwest 251" to the Airport or any "University" property. Simply put, the prosecutor argued a fact not in evidence. The conviction for trespass was overturned.

### **Resisting Arrest**

Under section 575.150 .1, resisting arrest is a crime if the person being arrested resists by one of four separate means: (1) by using violence, (2) by threatening to use violence, (3) by using physical force, or (4) by fleeing from the officer making the arrest.

Caldwell was charged with resisting arrest, by refusing to exit the vehicle at Officer Schmidt's request. The State failed to prove that Caldwell resisted by one of the four means listed above.

The Western District stated that Caldwell's passive refusal to comply with the officer's request to get out of the car, does not constitute resisting arrest. There was no evidence of

violence or threatening to use violence, nor was there any evidence of physical force or flight presented by the State.

Conviction on the resisting arrest charge was also overturned.

## **EVIDENCE – Propensity evidence improperly admitted**

### ***State v. Moore, 352 S.W.3d 392 (Mo. App. E.D. 2011)***

A jury convicted Defendant of Felony Driving While Revoked, Second Degree Assault of a Law Enforcement Officer, Resisting Arrest, and Possession of a Controlled Substance. He was sentenced to a total of twenty-two years in prison.

Defendant was stopped by St. Charles Police for failing to stop for a stop light at 12:30 a.m. Upon checking defendant's driving record, it was revealed that the defendant had several outstanding warrants. The police officer told defendant that he was under arrest, but when he tried to handcuff the defendant and take him into custody, the defendant drove away in his truck. In the process the door of the truck hit the officer in the leg. A 45 minute car chase ensued after which defendant stopped his truck and fled on foot. He was eventually apprehended.

Prior to the trial of the case, defendant filed a motion in limine to prevent admission of his driving record. Defendant also offered to stipulate to all the elements of the charge of driving while revoked, but the State refused the offer. Prior to trial defendant argued that the court should limit the admission of the driving record to the most recent entries which would establish defendant's knowledge of his revoked status. The State however, was adamant that the entire driving record be admitted to show defendant's knowledge of his revoked status, citing several cases in support of its argument that the entire driving record be admitted. The court ruled in favor of the State and the defendant's entire driving record was admitted. Defendant's driving record revealed that he had been convicted on twenty-two previous occasions of driving while suspended or revoked.

In his closing argument, the prosecutor mentioned five times the defendant's twenty-two prior convictions for driving while revoked. At one point the prosecutor stated "The final count is ...driving while revoked. In his opening statement defense counsel said you should find him guilty of that. Who am I to argue with counsel. Of course you should. *But you need to find him guilty of everything else, too, because this isn't going to mean anything to the defendant.*" (Court's emphasis)

The jury requested all exhibits (including the extensive driving record) for use during its deliberations.

A critical factor in the appellate court's decision was the fact that the defendant was willing to stipulate to all of the elements of the charge of driving while revoked. Therefore, none of the elements of driving while revoked, including the defendant's knowledge of his revoked status, was ever contested in the case. As a result, there was no issue in the case

on any of the charges to which the driving record contributed legally relevant information for the jury's consideration.

The court noted that the well established rule concerning the admission of evidence of prior criminal acts is that proof of the commission of separate and distinct crimes is not admissible unless such proof has some legitimate tendency to directly establish the defendant's guilt of the charge for which he is on trial. The rationale being that evidence of other crimes, when not properly related to the case on trial, violates the defendant's right to be tried for the offense for which he is indicted. Citing Article I, sections 17 and 18 of the Missouri Constitution. Thus, evidence of prior crimes is inadmissible if it is offered for the purpose of showing the defendant's propensity to commit new crimes.

The court went on to state that there are several exceptions to the general rule banning evidence of prior crimes which include motive, intent, absence of mistake or accident, common scheme or plan and identity of the person charged or to rebut statements made by a defendant during the trial. But the court found that not one of those issues was present in Moore's case.

In its analysis of the case, the court was troubled by the fact that the prosecutor made the defendant's driving record (fifty-six pages in length, showing twenty-two prior convictions for driving while suspended/revoked and covering a period exceeding twenty years prior to the events of the case at hand), the centerpiece of the State's case. This despite the fact that, after defendant's admission that he was guilty of driving while revoked, no contested issue remained in the case to which the driving record would relate.

The court concluded, in a rather harshly worded opinion critical of the prosecutor and the trial judge, that the State wanted defendant's entire driving record admitted into evidence to show to the jury that defendant was a bad person, and, further, as evidence of defendant's propensity to commit crimes, as a tool to persuade the jury to convict the defendant on all charges. The court found that the admission of the driving record was an abuse of discretion by the trial judge and that the error was prejudicial to the defendant, reversed the judgment, and remanded the case to the trial court.

The bottom line here is that the judge must, if proper objection is made, reject evidence of prior offenses in a case unless the evidence fits within one of the exceptions to the general prohibition on such evidence, or the evidence is necessary to prove a charge actually being contested in the case.

## **SEARCH AND SEIZURE - Search of a backpack upheld as part of search incident to arrest**

***State v. Ellis, 355 S.W.3d 522 (Mo. App. E.D. 2012)***

Defendant was approached by two police officers after being seen urinating on the wall overlooking a MetroLink platform. He was informed that he would be issued a summons for urinating in public. While checking the Defendant's ID, Defendant attempted to walk away. He was grabbed by the officer, whereupon the Defendant attempted to break away and began cussing at the officer. Defendant was then physically restrained, advised he was under arrest for resisting arrest, and handcuffed. A "pat down" search was done to make sure he did not have "anything on him". The backpack that he was wearing was taken because the officers were not "going to leave that on him in the car". He was placed in the patrol car and the doors were locked. The officers then searched the backpack as a search incident to arrest which the officer said he did "every time". Found inside the backpack were two tablets of MDMA or "ecstasy". Defendant moved to suppress the evidence found in the search of the backpack. The trial court refused to suppress and Defendant appealed.

The appellate court noted that searches without warrants are presumptively unreasonable unless they fall within certain exceptions. Among the exceptions cited are search incident to arrest and good faith exceptions.

The defense asserted that this was not a proper search incident to arrest, citing *Arizona v. Gant*, 129 S.Ct. 1710. The appellate court distinguished Ellis's case in that *Gant* dealt with the search of an automobile and the police could only search the vehicle if the arrestee is within reaching distance of the passenger compartment at the time of the search. No case has extended *Gant* to include personal effects, such as a purse or backpack, and this Court refused to do so based on a good faith exception.

Citing *United States v. Leon*, 468 U.S. 897, the Court noted that when police officers act in the good-faith belief that a search is legal, even if that search is ultimately determined to be unlawful, the evidence is still admissible. At the time of the search of Ellis's backpack, binding judicial precedents allowed police officers to search, as part of a search incident to arrest, the personal effects of the person of the arrestee.

Again asserting that no court had extended *Gant* beyond automobile searches, the court noted (quoting *Curd v. City Court of Judsonia, Arkansas*, 141 F.3d 839):

The human anatomy does not naturally contain external pockets, pouches or other places in which personal objects can be conveniently carried. To remedy this anatomical deficiency clothing contains pockets. In addition, many individuals carry purses or shoulder bags to hold object they wish to have with them. Containers such as these, while appended to the body, are so closely associated with the person that they are identified with and included within the concept of one's person. To hold differently would be to narrow the scope of a search of one's person to a point at which it would have little meaning.

Holding that the search by the officers complied with the binding precedent of search incident to arrest, the discovered controlled substance was not subject to the exclusionary rule.

In a further rejection of the defendant's contentions, the Court additionally stated that because of this finding, it would not address that the contraband would have been inevitably discovered in an inventory search.

**EVIDENCE - Admissibility of prior consistent statements to rehabilitate credibility – court’s right to reject guilty plea**

***State v. Williams*, 353 S.W.3d 685 (Mo. App. W.D. 2011)**

Damon Williams and others had held a “party” in the Motel 6 in Columbia and ran out of drugs. After discussing the need to buy more, the group decided that would rather rob someone of both marijuana *and* money. Williams and two others forced entry into a home. Williams shot and killed one occupant during the robbery and as a result, Williams was charged with murder in the first degree, robbery in the first degree and armed criminal action.

Williams first attempted to enter a plea per an agreement (open plea to felony murder with dismissal of robbery and ACA) but the Judge refused to accept the plea when Williams equivocated later. The case went to a jury and Williams was convicted of first degree murder, first degree robbery and armed criminal action. He was sentenced to life without the possibility of parole for murder, a concurrent term of 20 years for robbery and a consecutive term of 15 years for ACA.

One of the co-defendants testified against Williams in exchange for a plea to first degree robbery. Williams counsel on cross-examination implied the co-defendant’s statements were fabrications made to secure a better deal from the State. The State then called Detective Short, who presented evidence as to the co-defendant’s statements made during two interviews prior to the plea deal being made. Defense counsel objected to this testimony, arguing it improperly bolstered the co-defendant’s testimony. This point was appealed.

The Court noted that improper bolstering occurs when out-of-court statements are offered solely to duplicate or corroborate trial testimony, citing *State v. Gaines*, 316 S.W.3d 440. However, The Court found clearly stated law on this point, citing *State v. Ramsey*, 864 S.W.2d 320, “[P]rior consistent statements are admissible for the purpose of rehabilitating a witness whose credibility has been attacked by an express or implied claim of recent fabrication of trial testimony” and *State v. Robinson*, 194 S.W.3d 379, which states “[S]tatements consistent with trial testimony given before the corrupting influence to falsify occurred are relevant to rebut a claim of contrivance.” The court held the prior statements testified to by the Detective were admissible for the purpose of rehabilitating the co-defendant’s credibility.

The Court’s rejection of Williams’ guilty plea was also appealed. The Court ordered a sentence assessment report and then admonished Williams at the plea hearing: “Do you understand, Mr. Williams, if you tell the probation officer something different than you’ve told me, I’m not going to accept your plea?” Twelve days later, Williams sent a letter to the Court stating he was innocent and he had no choice but to plead guilty because everyone was falsely implicating him. When called before the Court, the Judge asked “You pled guilty because it was the easy thing to do. Is that the way it is?” Williams agreed. The Court then stated it did not sentence innocent people and refused to accept the plea.

In citing *State v. Creamer*, 161 S.W.3d 420, the Court noted, acceptance of a guilty plea occurs at the conclusion of the plea proceeding. The Court has virtually unlimited discretion prior to acceptance of the plea to refuse any plea of guilty outright or to reject any plea bargain. Upon the court's unqualified acceptance of the guilty plea, double jeopardy attaches.

The Court found the trial court's acceptance of the plea was not without qualification based on the notice given that it would not accept the plea if Williams later attempted to maintain his innocence. Furthermore, Rule 24.02 (d) (2) permits the Court to defer the acceptance of the plea until after review of the pre-sentence investigation. Because of this Rule and the qualification and admonition at the plea hearing, the trial court had "virtually unlimited discretion" to refuse the plea.

#### **SEARCH AND SEIZURE – Fourth Amendment protections extend to telephone text messages**

*State v. Clampitt*, \_\_\_ S.W.3d \_\_\_ (Mo. App. W.D. 2012) WD73943

The State appeals the trial court's order suppressing evidence of telephone company records of defendant's phone records and text messages, which records were secured by way of investigative subpoena. The Western District affirms the suppression order.

The facts: Clampitt had been involved in a fatal automobile accident and he was eventually charged with manslaughter and leaving the scene of an accident. Prior to the charges, the State only five days after the accident had issued two investigative subpoenas requiring U.S. Cellular to reveal essentially all information in their possession pertaining to Clampitt's cell phone between the date of the accident and the date of service of the subpoenas. A few weeks later, two additional investigative subpoenas were issued to U.S. Cellular for additional information, again, from the date of the accident to the date of the subpoena. The prosecutor later testified that she did not seek a warrant because the records were "in possession of a third party." The trial court suppressed the records, stating that Clampitt had a reasonable expectation of privacy in his text messages, that the investigative subpoenas were unreasonably broad, and that the good faith exception to the exclusionary rule was inapplicable to prosecutors.

In affording broad Fourth Amendment protection to the text messages here, the Western District equates text messages with e-mail and snail mail communications. The mere fact that e-mails are accessible by the author's internet service provider, or the author's snail mail has been delivered to a letter carrier for delivery, does nothing to reduce the author's expectation of privacy in such communications. Text messages should be treated the same.

The State further argued that Section 56.085, R.S.Mo. allows for prosecutors to obtain investigative subpoenas during the course of a criminal investigation. But the problem seen by the Court was that these four subpoenas covered a span of not only the date of the accident, but the subsequent thirty-one days as well. This was seen to be simply too broad and intrusive.

Finally, the State argued that there had been good faith reliance by the prosecutors on the subpoenas that had been issued, so the fruits of those inquiries should have been allowed into evidence. The landmark case on that score is *United State v. Leon*, 468 U.S. 897 (1984). But in *Leon* it was the issue of good faith of the *police* conduct, not that of the *prosecutor*. Thus, the good faith exception was inapplicable here. Suppression order affirmed. *Motion for rehearing or transfer to Supreme Court denied on February 28, 2012.*

**D.W.I. – Officer’s failure to precisely follow NHTSA guidelines in field sobriety testing does not invalidate results**

*State v. Burks*, \_\_\_\_ S.W.3d \_\_\_\_ (Mo. App. S.D. 2012) SD31023

Defendant was convicted at a bench trial before an Associate Circuit Judge of driving while intoxicated in violation of Section 577.010. The Court of Appeals affirmed the decision.

Springfield police officer Jonathan Conklin observed the defendant’s motor vehicle driving 90 M.P.H. in a 40 M.P.H. zone. He pulled him over and then observed glassy, watery, and bloodshot eyes and a strong odor of intoxicants exhibited by the defendant. Burks admitted drinking one beer, and swayed and stumbled when exiting his motor vehicle. The police officer then administered the Horizontal Gaze Nystagmus (H.G.N.) test, the walk-and-turn test, and the one-legged stand test to the defendant. He then asked the defendant to submit to a portable breath testing machine which the defendant refused to do. The defendant was then arrested. The defendant also refused to take a breath test at the police department. The defendant also stated at the jail that he had two beers that evening and that he was under the influence of alcohol.

The first point on appeal was whether or not the above facts constituted sufficient evidence to convict the defendant of driving while intoxicated. The appellate court held that the evidence set out above established a factual basis for the trial court’s finding that the defendant had indeed been operating the vehicle, and that he had been doing so while intoxicated.

The defendant’s second point on appeal was that the court erred in admitting the officer’s testimony about the results of the field sobriety tests given. Officer Conklin testified he had received eight hours of training on the H.G.N. test, and that he had administered approximately 20 to 30 field sobriety test batteries to drivers of motor vehicles during his three year career as a police officer. Officer Conklin then explained how he administered the H.G.N. test to the defendant. At the end of his testimony the defendant’s attorney objected to the officer testifying about the results of the H.G.N. test because the officer did not give 5 required National Highway

Traffic Safety Administration (N.H.T.S.A.) instructions during the H.G.N. test and therefore there was an inadequate foundation for admission of the results. The trial court overruled the objection. The officer then testified to the walk-and-turn test in the same manner. The defendant’s attorney objected to inadequate foundation again because the police officer did not give 11 required N.H.T.S.A. instructions to the defendant. The court overruled the objection.

The police officer then testified to the one-legged stand test. The defendant's attorney again objected to improper foundation for the results because the police officer did not give 10 required N.H.T.S.A. instructions to the defendant. The trial court overruled the objection.

The Court of Appeals opinion held that nothing in the record indicated that the trial judge was ever shown the relevant N.H.T.S.A. guidelines or that they were in evidence at the trial. The Court cited: *State v. Ostdiek*, 351 S.W. 3d 758, 770-771 (Mo. App. W.D. 2011)(pp. 28-29, *supra*) for the holding that the proper foundation for admission of an H.G.N. test is that the officer was adequately trained to administer and score the test, and the test was properly administered by the police officer. The Court also cited *State v. Hill*, 865 S.W.2d 702, 704 (Mo. App. 1993) and *State v. Rose*, 86 S.W.3d 90, 98-99 (Mo. App. 2002) for the required steps for the H.G.N. test to be properly administered. The court then discussed the defendant's objections that the officer did not follow the required N.H.T.S.A. instructions. Judge Jeffrey W. Bates writing for a three judge panel stated:

**“Defendant has cited no authority and we are aware of none, holding that an adequate foundation for the admission of H.G.N. test results requires testimony from the officer that all of the N.H.T.S.A. guidelines were followed during the administration of the test.”**

The opinion then stated that the objections went solely to the weight to be given the testimony by the trial judge, not to the admissibility of the H.G.N. results.

Judge Bates then wrote that the walk-and-turn test and the one-legged-stand test merely assist the police officer in observing the defendant's reactions and physical condition. **Since these observations can be made simply by watching the defendant's performance on the tests, compliance with N.H.T.S.A. guidelines for the tests are not required and no foundation for the scientific basis for the tests are required to testify about the police officer's observations of those field sobriety tests.**

The opinion then stated that the objections went solely to the weight to be given the testimony by the trial judge, not to the admissibility of the walk-and-turn and one-legged-stand test results. In spite of the Southern District's "weight not admissibility" ruling, it would nonetheless seem to be the better practice for the officer to assure substantial compliance with N.H.T.S.A. guidelines in determining the weight to be given the field sobriety test results. And this is particularly so in a B.A.C. case where the issue is not just intoxication, but a blood alcohol content of .08% or above.

The third issue on appeal was the admission of the defendant's refusal to take the portable breath test (P.B.T.). The appellate court held that the **defendant's refusal to take the portable breath test could be considered as evidence on the issue of probable cause** as allowed by Section 577.021 since the defendant had filed a motion to suppress based on a lack of probable cause to arrest prior to trial. The opinion cites two 2006 cases involving the Missouri Director of Revenue as support for this holding. The opinion was also clear that the P.B.T. refusal **could not be used as evidence of intoxication in the case in chief on the issue of blood alcohol content.** *Case disposed, mandate sent on February 24, 2012.*

**EVIDENCE- No prejudice where photos of assault defendant's arms showing scratches also depicted prison and occult tattoos**

***State v. Sperling*, 353 S.W.3d 381 (Mo. App. S. D. 2011)**

**Facts:** Donald Shane Sperling (“Appellant”) was convicted by a jury of first-degree domestic assault and armed criminal action. The trial court sentenced him to two concurrent terms of twenty-five years imprisonment. He brings this appeal claiming the trial court erred in admitting photographs of his arms after his arrest because the presence of tattoos in the photographs were prejudicial to his defense.

Appellant and T. M. (“Victim”) were romantically involved and living together in Victim’s home with her three sons. Victim had previously been married and her ex-husband was living in Georgia. On a night prior to the attack, Appellant and Victim had been arguing. Victim called Appellant “crazy” to which Appellant replied, “If you think I’m crazy, you’ll see how crazy I am.” Victim testified that she had seen Appellant with a knife before she was stabbed. Victim and two of her children had recently returned from a trip to Georgia when Appellant requested that one of the Victim’s sons join him outside in the front yard and questioned him privately about whether Victim had seen her ex-husband while she was in Georgia. Appellant kept his right hand “on his pocket on the outside like he was trying to pull something” during the conversation.

While talking to her friend on a cordless telephone, Victim came outside from around the back of the residence to where the meeting was occurring. When Victim arrived in the front, the children went inside to a bedroom. Victim started walking toward the house, while still on the phone, but Appellant followed her step by step. Victim turned around, told Appellant he was “freaking [her] out,” and asked him what he was doing. As she continued walking toward the door, Appellant began yelling and attacked her.

After the attack, Appellant fled the scene. He turned himself in to Sergeant Hall of the Ava Police Department the next day. Sergeant Hall noticed fresh scratches on Appellant’s arms. Photographs were taken of Appellant’s arms and the photographs were admitted at trial over defense counsel’s objection. Appellant claims error in the admission of these photographs.

Appellant does not contend that the photographs do not fairly depict fresh scratches on Appellant’s arms. Rather, he argues that the photographs show “prison tattoos and other tattoos depicting the occult, violence and otherwise distasteful images.”

During the testimony about the photographs, the prosecutor did not mention, nor was the witness asked about the tattoos. Rather, the prosecutor merely asked Sergeant Hall to describe the photos, which he stated were photos of recent scratches on the arms of Appellant.

The Appellate Court stated that the photographs are merely demonstrative evidence to show the fresh scratches on Appellant’s arms. The pictures accurately depicted the scratches on Appellant’s arms; and they tended to corroborate the testimony of Victim that she was attacked by Appellant. They aided the jury in understanding Victim’s testimony and the State’s theory that Appellant fled into the woods after the attack.

The judgment of the trial court is affirmed.

## **D.W.I. – Credible officer testimony sufficiently established probable cause for arrest**

***Sostman v. Director of Revenue*, \_\_\_ S.W.3d \_\_\_ (Mo. App. E.D. 2011) ED95557**

Sostman was arrested for Driving While Intoxicated. During the interview and field sobriety testing, Sostman was described as having a slight smell of alcohol. He performed reasonably well on the field sobriety tests. The trial court found the arresting officer to be credible in his testimony, but found that the arresting officer lacked sufficient probable cause to arrest the defendant. The trial court therefore reversed the decision of the Director to suspend the driving privileges of the defendant.

On appeal the Eastern District reversed the trial court, finding that when the arresting officer was determined to be credible, and the defense did not find any issues to attack the credibility of the arresting officer, the court should look to the results of the field sobriety tests to determine the existence of probable cause for the arrest. In this case, where the results were mixed, the officer had probable cause to arrest the defendant and to continue his investigation of the charge. In essence, the partial failing of the field sobriety tests provided adequate support for the finding of probable cause. *Application for transfer filed in Supreme Court on February 6, 2012.*

## **SEARCH AND SEIZURE – Search of curtilage invalid based on expectation of privacy**

***State v. Bates*, 344 S.W.3d 783 (Mo. App. S.D. 2011)**

Defendant Marty Joe Bates was charged with trafficking drugs in the second degree. He filed a motion to suppress physical evidence found during the search of a shed located on his property behind his trailer home, which motion was sustained. The State appealed, arguing that the evidence was admissible under the inevitable discovery doctrine. The trial court was affirmed.

Two Oregon County sheriff's deputies and two bail bondsmen went to Defendant's residence looking for an individual who was delinquent on a bond and was a fugitive on an active driving-related warrant. They believed the individual was staying at Defendant's house. The residence was located fifty-to-seventy-five feet off the state highway. Even though the third party's truck was not there, one deputy and one bondsman circled around the house in case the third party tried to escape out the back door. The other deputy and bondsman went to the front door. The deputy at the rear of the house discovered a marijuana plant in a bucket on a stone pathway located behind the rear-corner of the house, six feet from the back of the home. The marijuana plant was not visible from the front or side of the residence. The woman who was home refused to grant permission to search. A search warrant was obtained.

The trial court found that discovery of the marijuana plant by the deputy during the search of Defendant's property violated Defendant's Fourth Amendment rights. As a result, since the marijuana plant formed the probable cause for the search warrant, the methamphetamine seized during the search was ruled inadmissible as tainted fruit of the poisonous tree.

The State argued that the marijuana plant was in plain view. Defendant argued that the deputy unlawfully entered the curtilage of his home when he discovered the marijuana plant. Four factors are considered in determining whether a area is within the curtilage of a home: (1) “the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; (4) the steps taken by the resident to protect the area from observation by people passing by.” *U.S. v. Dunn*, 480 U.S. 294, 301, 107, S. Ct. 1134, 94 L.Ed. 2d 326 (1987). These factors are useful to the extent “they bear upon the centrally relevant consideration - whether the area in question is so intimately tied to the home itself that it should be placed under the home’s ‘umbrella’ of Fourth Amendment protection.”

Having determined that the search violated Defendant’s Fourth Amendment protection, the State’s argument that the evidence would inevitably have been discovered was rejected. The Court found that the “assumption-based argument is pure speculation,” citing *State v. Rutter*, 93 S.W. 3d 714, 726 (Mo. banc 2002), “inevitable discovery analysis cannot involve speculation and must focus on demonstrated historical facts capable of ready verification or impeachment.”

#### **ELEMENTS OF THE OFFENSE – Identity of owner of stolen goods irrelevant**

##### ***T.B., In Interest of*, 351 S.W.3d 243 (Mo. App. E.D. 2011)**

The Juvenile Division of the City of St. Louis Circuit Court found that the Juvenile Officer had proven beyond a reasonable doubt that T.B. had committed the offense of stealing. At trial, the victim testified that a vehicle, owned by his mother, but of which he had possession with her permission, had been parked in front of his home. About noon he heard a sound like brakes “skirting” and found his vehicle gone when he looked out the window. He ran outside to find the car running at the end of the street. The driver’s side door was open. As he walked toward the car, a head popped up in front. The person appeared to be inspecting the tires or underside of the car. As the Victim approached the person and asked what he was doing, the person ran away. Victim testified he never saw the person in the car. After the person ran away, he looked inside the car and saw that the ignition had been torn out. 20 to 30 minutes after the incident, police arrested T.B. a few blocks away. They brought Victim to where the arrest had taken place. Victim identified T.B. as the person he had seen in front of the car.

The sole point on appeal claimed there was insufficient evidence to find T.B. had committed the offense of stealing because the State failed to prove beyond a reasonable doubt that the mother of Victim owned the car or that T.B. intended to deprive her of her property. T. B. argued that since she did not testify, the testimony of Victim that the vehicle was owned by his mother with his permission to use it, was insufficient.

Citing *State v. Fowler*, 938 S.W.2d 894, 896 (Mo. banc 1997), the court found that “the identity of the owner is not an element of stealing.” The “Victim’s testimony regarding his mother’s ownership of the car and his right to possession was enough to satisfy the State’s burden.” *State v. Wilhite*, 587 S.W. 2d 321, 324 (Mo. App.E.D. 1979)

T.B. argued that since the Victim never saw him in the car, the Court was precluded from concluding that he “appropriated” it, citing the definition from Section 570.010(2). “Appropriate” means “to take, obtain, use, transfer, conceal or retain possession of.” The court found “Victim’s testimony that he saw T.B. in front of the car, that T.B. fled the scene when he confronted him, that the car had been moved without Victim’s permission, and that the ignition had been removed from the steering column, taken together and with favorable inferences drawn therefrom are sufficient to sustain the trial court’s determination.” (Slip opn., page 4).

T.B. also argued the State did not prove the requisite “intent to deprive.” The court cited *State v. Martin*, 211 S.W.3d 648, 652 (Mo. App.W.D. 2007), “[w]here a defendant has control of property even for an instant and subsequently abandons it, he has manifested the required intent.” On the issue of whether T.B. could be convicted based on circumstantial evidence, the court held “[a] defendant may be convicted based on circumstantial evidence alone if the evidence, with all inferences taken in favor of guilt and all contrary inferences disregarded, is such that a reasonable juror might have found the defendant guilty beyond a reasonable doubt.”, citing *State v. Grim*, 854 S.W.2d 403, 405 (Mo. banc 1993).

## **EVIDENCE – Lay witness opinion testimony permitted in certain cases**

### ***State v. Jefferson*, 341 S.W.3d 690 (Mo. App. S.D. 2011)**

Elmer Jefferson appeals his conviction for two counts of distributing a controlled substance and one count of resisting arrest. A confidential informant, Holder, was instructed by a task force to purchase \$20 worth of crack at the corner of Commercial and Baldwin Street in Kennett, MO from anyone who was selling on that street corner. The car Holder was driving was equipped with video and audio equipment. Holder went to the designated corner and was approached by a man who offered to sell Holder crack cocaine. The way the video camera was set up, the individual's face was partially obscured by his hat and the driver's doorpost on the car as the drug sale went down. Holder went back to the station and showed the video to Agent Decker. Agent Decker did not recognize the man but described the man to Officer Yates. Officer Yates went back to the same corner looking for the suspect. He found a man matching Agent Decker's description. Officer Yates recognized the man as Elmer Jefferson, the defendant in the case. At Agent Decker's direction, Holder went back to the corner a second time and purchased \$20 more of crack cocaine. The second sale was caught on the video camera showing the defendant's face. When the officers went back to arrest defendant Jefferson, he struggled and the officers had to use pepper spray.

At the pre-trial conference, defendant Jefferson was disruptive and had to be admonished several times to behave. The trial judge warned defendant Jefferson twice that he would be removed from the trial if he did not agree to be respectful and not disruptive. Defendant would not agree and continued to disagree with the judge who had gone out of his way to allow defendant to file written motions and rule on each motion. Defendant's motions included claims of "double jeopardy" and conflicts of interest and improper jurisdiction. All were overruled.

Defendant continued to be argumentative challenging the judge's rulings. Defendant advised the judge he wanted another attorney and accused the judge of prejudice. The judge warned defendant again that if he would be removed if, in effect, he did not calm down. Defendant would not agree to behave. The judge had the bailiff remove defendant and then proceeded to trial. The jury returned a verdict of guilty on all three charges in about 5 and one-half hours which included jury selection, trial and deliberations.

Defendant raised two points on appeal. First, the trial court erred in allowing Officer Yates to testify as to defendant's identity as the person who sold drugs to Holder as it was improper opinion testimony because it invaded the province of the jury on an ultimate fact. The State countered that the court did not err in allowing Officer Yates' testimony because he had prior familiarity with defendant and because the officer's testimony identified the man in both tapes as the defendant. Defendant's second point on appeal was that the court erred in having him removed from the pre-trial conference and not allowing him to be present at his trial.

The appellate court found no abuse of discretion in admitting lay testimony of defendant's identity as the person in the videos selling drugs to Holder. The standard used by the Court was that "[D]iscretion is abused when a ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration." The Court reasoned that Officer Yates' testimony was ordinary identification and did not involve any "scientific, technical or other specialized knowledge" and, therefore, Officer Yates was a lay witness. "A lay witness generally is not permitted to give opinion testimony about a matter in dispute because the jury and lay witness are ordinarily in equal positions to reach an accurate opinion about the matter." Consistent with the general rule, a lay witness is permitted to give opinion about a matter in dispute when the lay witness' opinion is based on knowledge not available to the jury and would be helpful to the jury in reaching the jury's own opinion." "More specifically, a lay witness' opinion as to identity is admissible if there is a basis for concluding the witness had a specific opportunity to observe something that makes it more likely the witness can correctly identify a person than the jury." Because Officer Yates was familiar with defendant because of prior contact before the drug sale, he had information that the jury did not have in viewing the first video in which the defendant's face was obscured and the second video which was very brief. Officer Yates had also had the opportunity to view the defendant after his arrest and confirmed by defendant's clothing and appearance he was indeed the individual in the videos.

As to defendant's second point that the court erred in excluding him from trial was also overruled. The appellate court used the standard that a reviewing court will not find error if the trial court was given no opportunity to correct, and a point raised on appeal must be based upon the theory of the objection as being made at trial. Defendant's counsel made no objection at trial hence there was nothing preserved for review. There was a request from defendant's counsel at the pre-trial conference to continue the case and see if defendant would participate on another day. Defendant claimed error by the trial judge removing him from the trial without defendant "knowingly, intelligently and voluntarily waiving his right to be present at trial, and without giving Appellant a subsequent opportunity to reclaim his right to be present at trial." The reviewing court found that the point raised by defendant would be a plain error pursuant to Rule

30.20 and as such is discretionary and involves a two-step analysis. First the review considers the facts and circumstances to facially determine if there was plain error. Was it evident, obvious and clear error? (A footnote of the decision noted that defendant's tirade took up 10 pages of the 25 pages of the pre-trial transcript.) Once there is a determination of plain error, then the review moves to the second step. Was there manifest injustice, or a miscarriage of justice?

The appellate court found no plain error because the trial judge warned defendant several times he would be removed and not permitted to participate in his trial, and also because of the exchanges between the defendant and the judge at the pre-trial conference. Defendant also argued he should have been told that he could reclaim his right to be present but the court reasoned that from what the judge told him, he could infer that if he behaved he could return and since the trial started right after he was removed from the pre-trial conference and only took 5 and one-half hours, the trial judge could properly reason the defendant would not change his mind in that period of time. No request was made by defendant's counsel to have defendant present at trial after he was removed from the pre-trial. Most importantly, the court on appeal found that "to conclude error on this point would result in an endorsement of Appellant's volitional conduct. "An accused person, placed upon trial and protected by constitutional and statutory safeguards, cannot be allowed to defy the processes of the law, paralyze the proceedings, and turn them into a farce, taking advantage of his own wrong."

#### **STATUTORY INTERPRETATION – Driving While Suspended is included in the definition of Driving While Revoked**

***State v. Acevedo*, 339 S.W.3d 612 (Mo. App. S.D. 2011)**

In these consolidated appeals, Daniel Acevedo ("Appellant") appeals his conviction by the trial court for two counts of the class D felony of driving with a revoked driver's license, violations of §302.321.2. Following a bench trial, Appellant was sentenced to concurrent terms of two (2) years in prison, one for each count, with the execution of those sentences suspended, and was placed on five (5) years probation on each count.

At issue is whether Appellant had sufficient prior convictions for a "revoked" driver's license, as that term is defined and set out in §302.321.2, in order to have enhanced his offenses from class A misdemeanors to class D felonies. In his sole point relied on, Appellant maintains the trial court erred in convicting him of the crimes charged because the State introduced only evidence to prove he committed class A misdemeanors in both cases such that the State failed to prove under §302.321.2 that he "had at least three prior (driving while *revoked*) convictions to enhance his offenses to class D felonies...." (Emphasis added.) Thus, Appellant asserts he was sentenced in excess of the maximum sentence authorized by law.

The record indicates Appellant was charged in two (2) separate cases with class D felonies for driving while license was revoked, in violation of §302.321.2, in October and November 2008.

The Court of Appeals analyzed §302.321 and §302.321.2. At trial the parties stipulated that the only issue was sufficiency of the prior convictions, which were to be used to enhance Appellant's crimes. The State introduced exhibits into evidence to prove Appellant's prior convictions of driving while revoked under §302.321. The Court of Appeals found that at the crime of driving while revoked encompasses "driving while suspended" as prior offenses. The trial court affirmed the convictions holding that any cancellation, suspension, or revocation of the driver's license constitutes a prior "driving while revoked."

#### **ELEMENTS OF THE OFFENSE – Concealment and functionality of lethal weapon shown by the evidence**

*State v. Wright*, \_\_\_ S.W.3d \_\_\_ (Mo. App. S.D. 2012) SD30872

In this case Appellant was convicted by a jury of unlawful use of a weapon, in violation of §571.030.1. The jury was instructed that to be convicted of unlawful use of a weapon, the evidence must have shown that Appellant knowingly carried a firearm upon or about his person, that the firearm was concealed from ordinary observation, and that the firearm was readily capable of lethal use. Appellant claims the trial court abused its discretion in overruling his motion for judgment or acquittal because there was *insufficient* evidence that the weapon was concealed and *insufficient* evidence that the weapon was a functional lethal weapon.

The Court of Appeals found no error and affirmed judgment. The Court of Appeals gives a good explanation of what is meant by "concealed weapon," and finds that there are two (2) instances for which a jury can find that the Defendant was carrying a concealed weapon. The witness had indicated that he had observed Appellant walking behind victim but did not see a gun on the Appellant. The second observation was from the victim, who testified she saw the Appellant pull *something* (a weapon) out to show her companion. There was further evidence that the gun was carried in the Appellant's waistband. The Court of Appeals said that a reasonable inference from the above-testimony was that Appellant was concealing a weapon in his waistband and either "pulled it out" or "showed it to the victim's companion in order to intimidate the victim and her companion." Further evidence of carrying a concealed weapon was indicated by the fact when the Appellant was apprehended there was a pat down and a loaded 9mm handgun was found in the Appellant's waistband.

The Appellant next argued that the State failed to prove that the firearm was functional. Appellant claimed that even if the gun was concealed, the State was required to show that the gun was a "functional, lethal weapon." The Court of Appeals mentions *State v. Purlee*, 839 S.W. 2d 584 (Mo. banc 1992). The Court of Appeals states Appellant's argument misses the mark on *Purlee* and subsequent cases that have used *Purlee* language. The argument was made about *Purlee*'s continuous journey feasibly through the state. The Court of Appeals noted *Purlee*, once the accused raises the defense that he is within one of the exempt classes stated in the statute, the state has the burden of proving he is not within the exemption. The Court of Appeals stated that the exemption discussed in *Purlee* has no relevance to the Appellant's claim that the state must prove that the weapon is functional. The Court of Appeals stated further, that the only mention of functional weapon is in the exception, "which is commonly known as the non-lethal use exemption." The Court of Appeals states further, "a careful reading of the cases that cite *Purlee*

for the proposition that the essential elements of the state's claim is proving that the firearm was functional, indicates that the elements apply only when the defense claims an exemption as designated in the statute. In *Wright*, Appellant was not contending that he was traveling in a continuous journey peaceably through the state, or that he was transporting a non-functional gun.

The Court of Appeals indicates that the verdict director provided that the gun had to be readily capable of lethal use, and not that it had to be functional. The definition of "readily capable of lethal use" provided in MAI-CR 3d 331.20, means readily capable of causing death. The Court states that "if the weapon is a firearm, it is readily capable of lethal use whether loaded or unloaded." In this case the Court of Appeals indicates the Appellant was concealing a loaded firearm, and by definition it was readily capable of lethal use.

The Court of Appeals affirmed the trial court's decision. *Application for transfer filed in Supreme Court on January 9, 2012.*

**EVIDENCE – When admissible evidence is inseparable from evidence which implicates defendant in another crime, the evidence is usually admissible in its entirety**

*State v. Pascale*, \_\_\_ S.W.3d \_\_\_ (Mo. App. E.D. 2011) ED95851

**The facts:**

Defendant had been ordered to leave the marital home after several reported instances of domestic abuse. After Defendant moved out, a neighbor began assisting Defendant's wife and children. Defendant threatened that he would crush neighbor with a car if he did not stop helping Defendant's wife and children.

Sometime later, Defendant observed his wife and neighbor unloading goods from the rear of neighbor's car. Another neighbor witnessed Defendant drive a minivan down the street, run into the back of neighbor's car, jump the curb and hit a street sign. Wife and neighbor managed to move out of the way. When officers arrived, Defendant claimed it was an accident.

At trial, when the prosecutor asked wife on direct examination if defendant had ever hurt her, as part of her explanation wife stated that "he beat me and he beat my daughter." Defendant did not object.

Wife made a similar statement during cross-examination in response to defense counsel's attempt to imply that wife had a problem with Defendant because he had told her to stay away from neighbor. The trial court overruled Defendant's objection on grounds that defense counsel had opened the door to the prosecution's line of questioning when defense counsel raised the previous implication.

Defendant was convicted of one count of domestic assault and one count of assault.

### **The Issue:**

How should the trial court rule on the issue of separability of proffered evidence, a portion of which makes reference to an alleged prior bad act directed against someone who was not a victim of the subject offense.

### **Conclusion/Finding:**

Trial court's decision is affirmed. A trial court's ruling on admissibility will be upheld if it is sustainable under any theory. *State v. McLaughlin*, 272 S.W.3d 506,509 (Mo. App. E.D. 2008). **"When admissible evidence is inseparable from evidence which implicates defendant in another crime, the evidence is usually admissible in its entirety. Whether evidence is inseparable is left to the sound discretion of the trial court."** *State v. Henderson*, 826 S.W.2d 371,374 (Mo. App. E.D. 1992). Evidence of uncharged crimes and bad acts may be admitted to show motive, intent, the absence of mistake or accident, common scheme or plan, or the identity of the person charged. *State v. Collins*, 669 S.W.2d 933 (Mo. App. Banc 1994). *Case disposed, mandate sent on December 1, 2011.*

### **SEARCH AND SEIZURE – Warrantless attachment of GPS device to defendant's vehicle is an unlawful "search" under Fourth Amendment**

*United States v. Jones*, \_\_\_ U.S. \_\_\_ (2012) No. 10-1259, January 23, 2012

Defendant was convicted of drug trafficking. The conviction was based on evidence derived from the surreptitious installation of a GPS device on defendant's vehicle. It tracked defendant's movements for 28 days. There was no supporting search warrant. The D.C. Court of Appeals reversed the conviction based on a violation of the Fourth Amendment. The U.S. Supreme Court affirmed in a 9-0 decision, declaring that the warrantless installation of such a device constituted an unlawful "search" within the meaning of the Fourth Amendment.

Mr. Justice Scalia delivered the opinion of the Court, first noting that in recent decades there has been a shift in Fourth Amendment cases from the traditional common-law trespass analysis to the more modern "expectation of privacy" concept as first set forth in *Katz v. United States*, 389 U.S. 347 (1967). The Government argued that the defendant here had no reasonable expectation of privacy as to the movements of his vehicle; the theory being that the Government's agents could have followed the defendant every day for 28 days and that effort would have been readily upheld. But the Court rejected that contention, declaring that the "expectation of privacy" concept does not even arise in a case such as this. Here, the threshold inquiry is whether the questioned activity by law enforcement runs afoul of the Fourth Amendment's ". . . particular concern for government trespass upon the areas it enumerates." And most assuredly, one's automobile falls within the protected area of ". . . persons, houses, papers and effects, . . ." enumerated in and protected under the Fourth Amendment.

## EVIDENCE – Spoliation doctrine discussed, but not specifically applied

### *Zahner v. Director of Revenue*, 348 S.W.3d 97 (Mo. App. W.D. 2011)

The Director of Revenue appeals the trial court's judgment reinstating the driving privileges of Richard Zahner. Affirmed.

After failing several of the field sobriety tests, Zahner was arrested and taken to the station house. The officer claims he asked Zahner to take a breath alcohol test. Zahner says he was never so asked. Thus the trial court was faced with a "he said, she said" situation. The trial court allowed both sides to tell their story, and during the Director's case, the officer testified that the whole thing would be cleared up by a review of the video of Zahner's booking at the station. The officer claimed that his side of the story would be borne out by a review of the video. The trial court instructed the Director to produce the video for the court's review, strongly suggesting then and there that the officer's testimony alone might not carry the day.

But strangely, a week later counsel for the Director advised the court that the tape had been "destroyed as part of the post arrest routine." In ruling in favor of Zahner, the trial court admitted to being "troubled" by the suddenly missing evidence, but did *not* find any specific wrongdoing by the police. Rather, the court weighed the conflicting evidence and found the Director's evidence to have simply come up short and the driver's rebuttal evidence to have been more persuasive.

The Court of Appeals first noted that the spoliation doctrine may not be applicable to the Director for the conduct of police officers. But without deciding the point one way or the other, the Court observes that there has long been a recognition of the spoliation doctrine in Missouri. The doctrine pertains to the destruction or significant alteration of evidence. If a party intentionally spoliates evidence, that party is subject to an adverse evidentiary inference. "The standard for application of the spoliation doctrine requires that there is evidence of an intentional destruction of the evidence indicating fraud and a desire to suppress the truth." *Prins v. Director of Revenue*, 333 S.W.3d 17, 20 (Mo. App. W.D. 2010). But the doctrine is generally inapplicable against the Director when police departments destroy evidence, because the police do not generally act as the agents of the Director.

In articulating the major point in this decision, the Western District held that, "There is no rule of law, however, that requires the trial court to ignore the destruction of evidence – even if the trial court finds no evidence of fraud, deceit, or bad faith – when the trial court is weighing the credibility of the witnesses in an evidentiary proceeding." 348 S.W.3d at 101. The Western District notes that the evidence in the case was hotly contested on several issues, and the trial court did not limit either party's opportunity to present evidence in support of their respective positions. The appeals court further observed that the trial court specifically included language in its judgment that it was *not* inferring any bad faith in connection with the destruction of the video tape. About the most that can be said on that score was that the trial court found the destruction of the tape "troubling" and "odd" enough that, under the circumstances of the case, the trial court chose to believe the driver's rebuttal evidence.

In footnote 3 of *Zahner*, the Court of Appeals describes those situations where, even if there is totally innocent or accidental destruction of evidence (such that the spoliation doctrine

would not specifically apply), nonetheless the trial court is free to “believe all, part or none of the officer’s testimony” and is “free to consider the failure to produce the video and audio recordings in its decision.” *Douglas v. Director of Revenue*, 327 S.W.3d 555, 557, footnote 3 (Mo. App. S.D. 2010).

**Comment:** This case might arise, for example, in a municipal court proceeding where police dash cam evidence is claimed to support the city’s case (i.e., lane use violation, poor performance on field sobrieties), but then it is later determined that the tape has been overwritten and is no longer available (even if the absence is entirely innocent). The court could still take into account the missing evidence in reaching a decision on the credibility of the party who once possessed, but now cannot produce, the video evidence.

## **CRIMINAL PROCEDURE – Discussion of the practice of taking motions to suppress with the trial of the case**

### ***State v. Ingram*, 341 S.W.3d 800 (Mo. App. E.D. 2011)**

Defendant Amos Ingram was convicted of various drug and firearm offenses. He was sentenced as a prior and persistent offender to 14 years in the Department of Corrections. He appealed his convictions, claiming the trial court erred in overruling his motions to suppress both his statements and certain evidence.

Before trial, Ingram’s trial counsel filed a motion to suppress evidence claiming that the search that produced the weapon, drugs and paraphernalia seized by police was done without probable cause. Counsel alleged that the warrant itself was based on false statements by detectives. Defense counsel also filed a motion to suppress the Defendant’s statements, asserting that they were made involuntarily and that any statements made by the accused were obtained pursuant to an unlawful arrest stemming from the same search which was said to be unsupported by probable cause. The trial court did not hold a hearing prior to trial on the motions to suppress evidence and the statements but rather, took the motions with the case. Nor did the court determine prior to or during trial whether the Defendant’s statements were voluntarily made.

Detective Singh testified at trial that he applied for a search warrant with the Circuit Attorney’s Office after receiving information from a confidential informant that Ingram was selling crack cocaine and heroin and was in possession of a firearm at 5017 Arlington, and that surveillance revealed certain activity at the address which was consistent with what the detective believed to be drug transactions. The warrant was presented to a judge who authorized the search warrant. The state failed to admit into evidence the search warrant, the search warrant application, or the supporting affidavits. Nor did Detective Singh testify about the contents of those documents at trial.

At trial, defense counsel raised objections to the admission of the evidence and the statements, and the trial court overruled the objections.

HELD; *Convictions reversed and case remanded.* The trial court was required to conduct a pre-trial hearing or a hearing during trial *outside the presence of the jury* to determine the voluntariness of the statements. The Eastern District found *State v. Edwards*, 30 S.W.3d 226 to be controlling in that when the voluntariness of a confession is challenged, it is the duty of the court to conduct a preliminary hearing outside the presence of the jury to determine whether the confession is admissible. “This case illustrates the substantial problems associated with a trial court’s taking *any* motion to suppress with the case”. *State v. Rains*, 537 S.W.2d 219, 223 (Mo. App. 1976).

Further, the appellate court could not determine whether probable cause existed for the search warrant at issue because the state failed to introduce into evidence the search warrant itself or any of the supporting affidavits. Therefore, the Eastern District found that denial of the motions to suppress by the trial court was erroneous; the appeal court’s review being limited to “the four corners of the search warrant and its supporting affidavits.” The Court found that the state has the burden to prove by a preponderance of the evidence that the court should overrule the motions and admit the evidence.

The appellate court, although reversing Defendant’s convictions, found that Ingram was not entitled to “an outright discharge” but rather, a new trial. Retrial is constitutionally permissible and does not run afoul of jeopardy protections where there has been a reversal based on erroneously admitted evidence.

Of note, the Eastern District found that, by contrast, a motion to suppress physical evidence falls within a narrow exception that allows a trial court to hear the motion to suppress physical evidence with the case in the presence of the jury, but such practice is also to be discouraged.

## **EVIDENCE – No error in denial of offer of proof where evidence had no probative value**

### ***State v. Sanders*, 353 S.W.3d 721 (Mo. App. S.D. 2011)**

Defendant Christopher Sanders appeals his Jasper County conviction for Felony Possession of a Controlled Substance. The Defendant claims on appeal that the trial court abused its discretion by not allowing the Defendant to show that no fingerprints were found on the baggies of cocaine that the Defendant had been convicted of possessing.

The state’s evidence was that officers responded to a call that someone was trying to sell illegal narcotics at a truck stop, and that two deputies approached the Defendant from behind as he offered to sell drugs to another man. When one deputy tapped Sanders on the shoulder, Sanders purportedly turned, “got a deer in the headlights look” and dropped two small baggies which were picked up by the deputies. The Defendant was subsequently arrested and the baggies tested positive for cocaine.

Prior to trial, the Defendant filed motions requesting access to all physical items held in evidence by the State so that Defendant's expert could examine the baggies for fingerprints, despite Defendant's denial of possession of the baggies at the time of his arrest. The court denied the Defendant's request, and Defendant filed a petition for writ of prohibition, or in the alternative, mandamus, seeking to prohibit the trial court from trying Defendant without first allowing Defendant's expert access to physical evidence for purposes of fingerprint examination. *State of Missouri ex rel. Christopher J. Sanders, Relator, v. the Honorable Gayle L. Crane, Circuit Judge*, 29<sup>th</sup> Judicial Circuit, Respondent, 326 S.W.3d, 131.

The Southern District issued a stop order on October 15, 2010, and eventually entered a permanent writ of mandamus, directing the trial judge to enter an order requiring the State to provide Sanders with access to the plastic bags subject to reasonable conditions as the court may impose. The Appellate Court found that the Defendant's right to obtain potentially exculpatory evidence was relevant to his defense, and failure to allow him access would be a denial of his right to due process, and "could potentially pose a problem if the underlying case should be appealed." *Id.* at 132.

At trial, Defendant sought to show the baggies bore no fingerprints, and in an offer of proof to the court, the Highway Patrol Lab Expert so testified. However, the same expert also said that in five and one-half years and in over one thousand fingerprint cases, she had *never* found fingerprints on baggies, and further explained many reasons why fingerprints would not be found on small drug baggies "like these." The trial court decided to exclude the evidence, finding that it had no probative value.

**HELD: Judgment and Convictions Affirmed.** The Southern District Court of Appeals held that the trial court enjoyed broad discretion to admit or exclude the evidence, and erred only if it clearly abused such discretion by a ruling so arbitrary, unreasonable and against the logic of the circumstances as to shock the sense of justice and indicate a lack of careful consideration, citing *State v. Hopper*, 327 S.W. 3d, 143, 152, and notes that the Defendant must also show prejudice; i.e., the probability of a different verdict but for the error. *Id.* The Appellate Court noted that the Defendant did not dispute that the state generally need not check for fingerprints or account for their absence, and no adverse inference can be argued from the state's failure to do so. *State v. Schneider*, 736 S.W.2d 392, 402 (Mo. banc 1987).

Most interestingly, the Southern District notes at very end of the opinion that "Defendant offers no case or persuasive argument showing the trial court's ruling to have been illogical, arbitrary, unreasonable, shockingly unjust, or ill-considered" (coupled with proof of prejudice). It is possible this might suggest a new standard of judicial review for determining trial court error by the Southern District.

## **CRIMINAL PROCEDURE – Assignment to trial judge, not setting of trial date, sets time for filing for change of judge**

***State v. Ford*, 351 S.W.3d 236 (Mo. App E.D. 2011)**

Harold Ford appeals the judgment of conviction and sentence entered after a jury found him guilty of two counts of murder in the first degree and armed criminal action. On June 10,

2009, the State filed a criminal complaint that charged defendant with shooting and killing two individuals on March 23, 2009. On September 23, 2009, a grand jury indicted the defendant for the two counts of murder and armed criminal action. On September 30, 2009, defendant was arraigned by the Presiding Judge and the defendant pled not guilty. Judge Ross assigned the case to Division 20, Judge Colleen Dolan, for hearing and determination. Judge Dolan scheduled a settlement conference for October 22, 2009. The Conference was rescheduled to December 3, 2009, January 21, 2010 and March 4, 2010. On March 4, 2010, the defendant filed a motion for recusal or in the alternative to disqualify. Judge Dolan denied the motion. On April 19, 2010, defendant's counsel filed an application for change of judge pursuant to rule 32.07. The motion stated that "while this application is out of time within the ten day limit, defendant asserts good cause for said application." On April 23, 2010, Judge Dolan held a hearing and denied the motion and set the case for trial on September 20, 2010. The defendant was found guilty and appealed.

The sole point on appeal is whether the trial court erred in denying the motion for change of judge under Rule 32.07. Defendant contends that his motions for change of judge were timely because the designation of the trial judge was not made until April 23, 2010, when Judge Dolan set the case for trial. Rule 32.07 states in part, "In felony and misdemeanor cases the application must be filed not later than ten days after the initial plea is entered. If the designation of the trial judge occurs more than ten days after the initial plea is entered, the application shall be filed within ten days of the designation of the trial judge..."

Defendant argues that the designation of the trial judge did not occur until April 23, 2010 when the case was set for trial. The Eastern District disagreed. It stated that the intent of the Supreme Court is determined from the rule's language. The words provided in the rule are given a plain and ordinary meaning. In absence of statutory definitions, the plain and ordinary meaning comes from a dictionary.

"Designate" is defined as "to name for an office; appoint." "Appoint" is defined as "to designate or place in office or post". To use the defendant's definition, the Eastern District noted that the Court would have to add language to Rule 32.07(b) that the designation of the trial judge occurs when the judge sets the date for trial. The language of the rule is not ambiguous. The Court stated that "we must give effect to the language of a statute as written and will not add words or requirements by implication where the statute is not ambiguous."

Furthermore, the Eastern District stated that adopting the defendant's argument would be contrary to the purpose of the timing requirements for change of judge under Rule 32.07. The timing provisions of Rule 32.07 are "designed to avoid undue delay in the proceedings and permit the trial court to administer justice in an orderly fashion. A trial judge could be assigned a case and make rulings on numerous issues before the case is set for trial. Thus, the Court ruled that when Judge Ross assigned the case to Judge Dolan on September 30, 2009 this constituted a "designation of the trial judge" for purposes of Rule 32.07(b). The motions for change of judge were untimely, and the Judge did not abuse her discretion in denying the motion.

**Comment:** Although this case deals with Rule 32.07 (the state court rule addressing change of judge procedures), the rule addressing municipal court change of judge procedures is

Rule 37.53. Rule 37.53 shares several similarities with Rule 32.07 but there are some differences as well. Notably, Rule 37.53 (b) asserts that it is the judge's duty to recuse if he/she is related to any defendant or has an interest in or has been counsel in the case. One can only assume that "related" denotes the same degree of relationship as defined in the judicial canons. If taken in a broader sense of the word, this could become a problem in small communities where everyone is related if you trace their roots back far enough. The rule also makes clear that this recusal is an affirmative duty, and no application for change of judge need be filed by the parties involved.

When application is made by the parties involved, just as in Rule 32.07, no reason or justification is necessary. However, there is different wording in the two rules as to the time frame when such an application can be made. Rule 37.53 (governing municipal cases), states that "The application must be filed not later than ten days after the initial plea is entered. *If the designation of the trial judge occurs less than ten days before trial, the application may be filed any time prior to trial.* If the designation of the trial judge occurs more than ten days after the initial plea is entered, the application shall be filed within ten days of the designation of the trial judge or prior to the commencement of any proceeding on the record, whichever is earlier." The italicized section does not appear in Rule 32.07. It was part of Rule 32.07 prior to 1993. However, the 1993 amendment to rule 32.07 actually rewrote this section and deleted this language in the state court rule. It would seem to be highly unusual in state court to have a trial judge designated such a short period before trial. However, it could be a more common occurrence in municipal cases where pretrial proceedings are limited and provisional judges only appear at set times of the month.

As a practical matter, most municipal judges simply grant motions for disqualification. However, it would seem that cases similar to *Ford* clearly give municipal judges a basis for staying on a case if an application is filed untimely and would create inconvenience to subpoenaed witnesses or an unnecessary delay in the proceedings. Since most municipal courts only have one judge, the trial judge is for all practical purposes designated when the defendant appears and enters a plea of not guilty. In most courts this happens when a defendant is arraigned, unless that defendant requests time to hire an attorney. Municipal courts are not courts of record, however, and thus, it would appear that the not guilty plea (assuming one is formally entered either by counsel or the defendant) must be designated in docket notes of the judge if the judge is to start the clock running on a change of judge request. Furthermore, even if the record is made, if a judge is setting cases for trial in less than ten days from that initial plea, the language in the rule makes clear that a change of judge request must be granted any time prior to the start of the trial.

If a judge contemplates the denial of a request for change of judge, it is important to remember that most Missouri courts liberally construe statutes and rules addressing disqualification of a judge in favor of the defendant's right to disqualify. It is incumbent on judges in municipal courts to make a good record if he/she is inclined to deny a request for change of judge. Although we may realize that there is only one judge in most municipal courts, many defendants may not have that knowledge, and thus, it might be prudent to clarify in writing whom the trial judge will be when trials are set for *pro se* defendants. At a minimum the court could start running the clock for change of judge at that time and avoid the situation of witnesses being subpoenaed and present when the defendant decides he wants another judge.

**D.W.I. – No prejudice by admission of officer’s opinion testimony where other strong evidence of guilt exists**

***State v. Savick*, 347 S.W.3d 147 (Mo. App. S.D. 2011)**

Defendant was convicted of driving while revoked, resisting arrest, assault on a law enforcement officer, and driving while intoxicated. Defendant appealed only his DWI conviction. Defendant argued that the trial court erred in allowing testimony of the police officer that he believed the Defendant was under the influence of a central nervous system stimulant based upon a drug recognition evaluation, without first establishing a foundation for admission of expert testimony.

Defendant was stopped after an officer observed him repeatedly looking at the officer in his rearview mirror and after a computer check of Defendant’s license plate revealed that they were expired plates. Pursuant to Defendant’s arrest, the officer conducted a series of field sobriety tests including HGN, walk and turn, and one leg stand – all of which the defendant failed. However, Defendant repeatedly denied drinking or being under the influence of alcohol, marijuana, or prescription medication. Moreover, after the Defendant consented to a breathalyzer, the test registered 0.00 percent blood alcohol content.

The officer then conducted a drug recognition evaluation, which is an eleven step process used to allow an officer to detect what category of controlled substance may have rendered an individual impaired or intoxicated. At trial, the officer testified over Defendant’s objection that it was his opinion, based on the drug recognition evaluation, that the Defendant had been under the influence of a central nervous stimulant and unable to safely operate a motor vehicle at the time of his arrest.

The Court assumed, without deciding, that the trial court abused its discretion in admitting the officer’s testimony. However, the Court went on to rule that, despite its recognition that the testimony should have been excluded, the Defendant cannot show prejudice by the admission of the officer’s challenged opinion testimony. The Court ruled that Defendant must show that “there is a reasonable probability that the jury would have acquitted but for” the officer’s challenged opinion testimony. *State v. Johnson*, 207 S.W.3d 24, 42 (Mo. banc 2006). Defendant has failed to make such a showing because the Court could take the drug recognition evaluation and the field sobriety tests into account as other evidence of Defendant’s intoxication or impairment.

Ultimately, the Court ruled that where there is strong evidence of the Defendant’s guilt other than the witness’s challenged testimony, no prejudice results to the Defendant as a result of the admitting that testimony. Judgment is affirmed.

**EVIDENCE – No clear reference made in closing argument about defendant’s right to remain silent**

***State v. Walters*, \_\_\_ S.W.3d \_\_\_ (Mo. App. E.D. 2012) ED96196**

Following a two day jury trial, Andrew Walters was convicted of several sex offenses. He did not testify at trial. He appeals, claiming improper closing argument by the prosecutor.

During closing argument, the prosecutor advised the jury that, “There really aren’t any real issues here. You either believe [Victim] or you don’t. That’s the bottom line. Because there isn’t anything else.” This argument went to the jury without defense counsel’s objection.

Defendant claims on appeal that such commentary amounted to an impermissible reference to the defendant’s having exercised his right to remain silent. But since the challenged argument went to the jury without objection, the Eastern District considers the matter on a plain error standard.

The Court notes that plain error will seldom be found in unobjected to closing argument. *State v. Kempker*, 824 S.W.2d 909, 911 (Mo. banc 1992). And even at that, the Court found that the prosecutor’s remarks in this case were more fairly characterized as commenting on the State’s *own* evidence in the form of the victim’s testimony, as opposed to commenting on the Appellant’s failure to testify. The Court notes that the prosecutor’s arguments here are quite similar to those which have been held to be a description of the strength of the State’s case as being uncontradicted or undisputed, which is not a reference to the defendant’s failure to testify. *State v. Taylor*, 944 S.W.2d 925, 935 (Mo. banc 1997). For these reasons, there is no error seen in the prosecutor’s closing argument. *Affirmed on this point, reversed on other points, remanded on February 21, 2012.*

**ELEMENTS OF THE OFFENSE – Constructive possession not shown in jointly occupied premises**

***State v. Ramsey*, \_\_\_ S.W.3d \_\_\_ (Mo. App. S.D. 2012) SD30846**

Earl Ramsey was convicted of possession of cocaine which had been found in a wastebasket in the bedroom of a home that he shared with his lady friend. It was a two bedroom home, but one of the bedrooms was strictly a storage room and there was no bed in that room. It was clear that both Ramsey and his companion shared the other bedroom. Thus, there was no exclusive control over the room in which the contraband was found.

The Southern District reversed Ramsey’s conviction based on the well established rule that “. . . where use and control of the premises is not exclusive” additional evidence is needed to link an accused to the drugs found there. *State v. Nobles*, 699 S.W.2d 531, 533 (Mo. App. 1985). The Court notes that this “exclusive/non-exclusive” dichotomy dates back to *State v. Funk*, 490 S.W.2d 354 (Mo. App. 1973) which surveyed cases nationwide due to scant Missouri

authority on that point, and followed what was then the nationwide majority view and has now become the law of the state of Missouri.

In this case there was simply no further evidence to buttress the mere finding of contraband in the bedroom that defendant shared with his companion. Such other evidence might have included paraphernalia found on the defendant, flight by the defendant from the police, or other acts indicating consciousness of guilt, drugs commingled with the defendant's personal effects, strong odor of drugs on the premises, the defendant's proximity to the contraband, drugs lying in plain view, or a defendant's incriminating statements. Since the state proved none of these additional elements, the Southern District found a failure to establish constructive possession by defendant and reversed and remanded with instructions that the trial court enter judgment of acquittal and order the defendant to be discharged. This discharge order was based on *State v. Janson*, 964 S.W.2d 552, 555 (Mo. App. 1998). Because the state had an opportunity to fully develop its case in the original trial, there was no remand for a new trial. *Reversed and remanded with instructions on February 16, 2012.*

#### **SEARCH AND SEIZURE – Sufficient probable cause found to justify search**

##### ***State v. Moore*, \_\_\_ S.W.3d \_\_\_ (Mo. App. S.D. 2012) SD31248**

Zecoby Moore was convicted of one count of possession of a controlled substance with intent to distribute. He appeals, claiming that the cocaine found in close proximity to him, and his confession that followed, were both fruit of an unlawful arrest.

The facts leading up to the charges against Moore were as follows: A drug task force observed a controlled purchase of narcotics from a Sylvester Tate. So it was clear that Tate was a dealer. After the controlled buy, the officers followed Tate's vehicle to a nearby gas station where Tate parked his vehicle next to a blue Chevrolet Impala.

The officers then saw defendant Moore get out of the passenger side of the Impala and walk over to the driver's side window of Tate's vehicle. Seconds later Moore returned to the Impala and got back into the passenger seat. Because the officer knew of the controlled buy only minutes earlier, and based on his observations of the interaction between Moore and Tate, the officer concluded that Tate had sold narcotics to Moore. Other officers responded to the scene surrounding both vehicles.

While officers were making several demands for Moore to get out of the Impala, he ignored their demands and appeared to be trying to stuff something either into his clothing or under the seat of the car. Based on their training and experience, the officers believed there might also be an effort to grab a weapon. Eventually Moore was yanked from the vehicle and handcuffed. There was an immediate patdown for weapons, but nothing was found. Nor was anything found in the search of the Impala. A passenger in Tate's vehicle told the officers that Moore and Tate had just completed a drug transaction. The officers told Moore that they knew

he had something hidden on his person, and it was just a matter of getting him to the police department headquarters and obtaining written permission from the Chief of Police to do a strip search.

Moore was taken to the back of a police van, the passenger compartment of which was separated by a steel mesh screen down the middle leaving one compartment on the right side and a separate compartment on the left side. There was a one inch gap between the steel mesh divider and the rear wall separating the holding section of the van from the driver's section. Before placing Moore on the right side of the divider inside the van, the detective observed the entire interior and saw that there were no objects in the van on either side of the divider.

About seven minutes later another officer opened the door to the left side of the divider to place another suspect in that area. Before entering the van, the suspect pointed out in the left portion of the van something that appeared to be a plastic baggie containing about 5 grams of an off-white powder. The powder later tested positive for cocaine. The baggie was too far inside the van to have come from this second suspect.

The officers took control of the contraband and later interviewed Moore, at which time he eventually confessed to purchasing the five grams of cocaine from Tate, that he intended to sell the cocaine, and that he had hidden the contraband in his buttocks as the police were descending upon the Impala.

Defense counsel filed a motion to suppress prior to trial, seeking to exclude both the cocaine and the statements resulting from the alleged illegal arrest. The motions were overruled and timely objections were made at trial as to the confession and the contraband. The sole point on appeal was the claimed erroneous ruling on the motion to suppress both the evidence and the statements.

The Court of Appeals will reverse a trial court suppression order only if it is clearly erroneous. *State v. Sund*, 215 S.W.3d 719, 723 (Mo. banc 2007). All that is necessary is to establish facts and circumstances sufficient to warrant a prudent person's belief that a suspect has committed an offense. *State v. Tokar*, 918 S.W.2d 753, 767 (Mo. banc 1996). There is a broad gulf existing between what is necessary to prove one's guilt and the requirement of probable cause to support a warrantless arrest. *State v. Duncan*, 944 S.W.2d 225, 226 (Mo. App. W.D. 1997).

In this case the defendant argued that while the officers might have had reason to do a patdown search, there was no evidence sufficient to arrest him and take him to the station house for further interrogation. After all, the patdown search revealed no weapons or contraband. The Southern District disagrees. The evidence was sufficient to suggest there had been a controlled buy of narcotics, which narcotics were thereafter transferred to the defendant. The Court was not persuaded by the defendant's argument that because the patdown search did not result in finding any contraband, there was no probable cause for the arrest.

Although nothing was found in the patdown search, the officers had seen Moore stuffing something either into his clothing or into the vehicle while he was refusing to comply with the

officers' requests to show his hands. The Court notes that Moore had obviously hidden the contraband in his pants in a place that a simple pat down search would not have discovered. And it was worth noting that the officers even told Moore that they knew he had something hidden on his person and he was going to be the subject of a strip search later. For all these reasons, the Court of Appeals held that the trial court properly overruled the motion to suppress both the contraband and the defendant's statements. Affirmed. *Case disposed, mandate sent on February 28, 2012.*

#### **D.W.I. – Operation of vehicle established by the evidence, even where driver found sleeping under the wheel**

##### ***State v. Wilson, 343 S.W.3d 747 (Mo. App. E.D. 2011)***

James Wilson appeals his conviction for felony DWI. He contends there was insufficient proof that he was either physically driving or otherwise “operating” a motor vehicle. The facts are these:

About 9:00 o'clock one morning witness Barbara Lehmen observed a maroon pickup stopping in the street in front of her house. The truck had tinted windows, so all she could discern was a lone driver, but she had no clear view of him. She watched for a while, thinking it was someone she knew. When no one got out of the truck, she resumed her housework.

About 30 minutes later the local police stopped to investigate because the truck was improperly parked on that street. The officer went to the open driver's window and looked inside. He saw the defendant asleep in the front seat under the steering wheel. The truck was still running. A strong odor of intoxicants was coming from the truck. The officer reached in and turned off the engine, then ordered the defendant out of the truck. There was a bit of a struggle getting defendant out, and he was arrested immediately for resisting arrest. He was unsteady on his feet, swaying and stumbling. At the station he blew a 0.273% on the breathalyzer. Wilson admitted he was intoxicated when the police found him in his truck. Naturally he was convicted.

On appeal Wilson asserts that there should have been a directed judgment of acquittal because, according to him, there was no evidence by which the fact finder could reasonably conclude that he was “physically driving or operating a motor vehicle.” He says he was merely sleeping in his truck. The Eastern District concludes otherwise.

There was both circumstantial evidence and direct testimonial evidence that he had driven the vehicle in an intoxicated condition. The Lehmen testimony established that *someone* had driven the truck there and that no one had exited the vehicle, and 30 minutes later the police found defendant alone under the steering wheel in his truck sleeping off the effects of his alcohol intake. The Court cites *Cox v. Director of Revenue*, 98 S.W.3d 548, 550-51 (Mo. banc 2003) as authority for finding “operation” of a motor vehicle by being asleep in the driver's seat with the engine running. And because of Wilson's high BAC, the jury could readily be allowed to find that he was intoxicated while driving the vehicle 90 minutes prior to the breath test. Reliance for

reaching such a conclusion based on a very high BAC is found in *State v. Vamett*, 316 S.W.3d 510, 518 (Mo. App. W.D. 2010). Conviction affirmed, but sentence vacated and case remanded for re-sentencing on a different point.